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BY

THE RIGHT HONOURABLE

SIR **JOHN COMYNS**, KNIGHT,

LORD CHIEF BARON OF HIS MAJESTY'S COURT OF EXCHEQUER.

THE FOURTH EDITION, CORRECTED,
AND CONTINUED DOWN TO THE PRESENT TIME,

By **SAMUEL ROSE**,

BARRISTER AT LAW, OF LINCOLN'S INN.

IN SIX VOLUMES.

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P O I A R.

(A 1.) How it shall be raised.

(A 1.) Upon what Estate.

IN conveyances to an use, a man may direct or model the use as he pleases, and the *st. 27 H. 8. 10.* executes the possession to the use; and therefore, he may annex powers to estates, which cannot be annexed to them by a conveyance at the common law. *Co. Lit. 237. a. Mo. 610.*

And therefore, to the limitation of an use for life, he may annex a power to make leases for 21, 99, or more years, or for one, two, or more lives.

Or, to make a jointure for a wife. *Mo. 381. 2 Lev. 58.*

Or, to grant annuities, raise portions, &c. *Mo. 381.*

Or, to make a jointure, and also a lease to commence after his death, for portions, &c. *Hard. 413.*

So, he may annex a power of revocation of all uses limited, to make a limitation of new uses, and this will not be repugnant. *Co. Lit. 237. a. R. Mo. 610. Vide Uses, (L 2, &c.)*

So, a power may be annexed to an estate by another deed, executed at the same time, though it be not in the same conveyance by which the estate is conveyed. *1 Vent. 279.*

So, a man may give a power or authority by will, which is a naked authority, not annexed to an estate; as, if he devises to *A. for life and afterwards that it shall be at his disposal to any of his children then living*; he has but an estate for life, with a naked power to dispose, in the manner directed by the will. *R. 1 Sal. 240. 3 Sal. 276.*

So, he may give a power to a stranger, which is a naked collateral power not annexed to an estate. *Per Hale, Hard. 415.*

Or, a power in gross, which takes effect after his estate determined. *Hard. 415.*

If a power be to *A.* or his assigns to make leases, &c. the power runs with the estate to the assignee in deed, or in law. *R. 1 Vent. 340. 2 Jon. 110. Vide post. (E).*

So, in all cases a power coupled with an interest may be assigned; as a power to a lessor and his assigns to cut down trees. *R. 2 Mod. 317.*

But a man cannot annex a power of revocation to a feoffment, or grant; for that will be void. *Co. L. 237. a. Mo. 610. Vide Uses, (L 2, &c.)*

So, if a man, seised in fee, covenant to stand seised to the use of himself for life, with power to make leases, remainder to another in fee, the power is not well raised. *Ca. Ch.* 161. If the consideration of the covenant does not extend to the power to make leases. *R. Mo.* 145. *1 Co.* 175. *R. Ray.* 248.

So, upon such covenant he cannot reserve a power to make leases, jointures, or for preferment of younger children, &c. *Mo.* 381. 383.

(A 2.) By what Words.

Words, which shew the intent of the party, are sufficient to create a power; as if a power be to demise or lease, though the intent is, that he declare the uses of the first settlement for life, or years: for the lease does not take effect by demise, but by declaration of the uses. *Mo.* 611. *Vide Uses*, (L 3.)

[If a man having an annuity in fee (issuing out of the four and half per cent. duty at Barbadoes) directs his executors to entail on his daughter and her issue, all his estate and effects; this, though it passes no interest to them, and though they take nothing as executors, yet it gives them power to convey. *Earl of Stafford v. Bulkley*, *H.* 1750, 2 *Vezev*, 170.]

So, if a man expresses the power only by implication, it is well; as, *provided that he shall not have power to alien, &c. otherwise than to make a jointure, and leases for 21 years*; it is a good power to make a jointure, and leases. *1 Leo.* 148.

So, if a devise be to *A. for life, to set, let, and make estates out of it as I might*, and afterwards to his daughter in tail; *A.* has a power to make leases, it being the custom of the country where the land lies, to let for lives or years. *R. 2 Rol.* 261. *l.* 35.

[But if lands are settled (by act of parliament) with a clause to restrain alienations, except for the *jointures of wives for term of life*, &c. a power for such jointress to lease her jointure lands for three lives, or years determinable on three lives, cannot be implied, though it is the usual way of leasing in that country. *Roe v. Grantham*, *M.* 2 *G.* 3. 3 *B. M.* 1259.]

But a power being executory, may be restrained or enlarged by a subsequent deed; as if a power be general, to revoke; by a covenant afterwards, that he will not revoke without the consent of *B.*, the power is restrained. *R. Jon.* 411.

So, if the consideration, upon which the power was founded, does not extend to the person, to whom the lease is made, the lease shall be void; as if a man covenant, in consideration of natural affection, to stand seised to the use of himself for life, &c. with power to make leases, &c. a lease to a stranger is void; for he is not within the consideration. *2 Rol.* 260. *l.* 30. *Vide Covenant*, (G 5.)

So, if a power, at its creation, be to make leases to a person, to whom the consideration does not extend, it will be void, though the lease be executed to a person within the consideration. *2 Rol.* 260. *l.* 35.

(B) How it shall be expounded.

(B 1.) To make Leases in Possession or Reversion.

A Power shall be expounded strictly. [*1 Bl. Rep.* 283. In the construction of powers originally equitable, the courts of law ought

ought to follow equity; but if they are originally legal, the courts of equity ought to follow the law. 1 Bl. Rep. 283. Cowp. 266. Doug. 293. (280.)]

And therefore if a man has power to make leases generally, this extends to make leases in possession only, and not in reversion. R. 2 Rel. 261. l. 5. 2 Cro. 318. Yel. 222. R. Ray. 248. R. M. 9 W. 3. in B. R. inter Winter and Loveday. (1 Ld. Ray. 267. 2 Sal. 537.) 1 Lev. 168. R. 6 Co. 33. a. Mo. 199. Semb. 1 Leo. 35. 3 Leo. 131.

Nor a lease to commence *in futuro*. R. Ray. 248. Semb. 1 Leo. 35. R. Yel. 222. 2 Cro. 318. Mo. 494. (A lease to commence from the day of the date is good under a power to grant leases in possession only, and not in reversion. Cowp. 714. Doug. 53. n.)

So, if the power be to make leases for two or three lives, he cannot make a lease to one not *in esse*; as to the son of B. not born, &c. Per Windb. Ray. 163.

So, if the power be to make leases in possession, he cannot make a lease of land in reversion, though it be to commence *in presenti*. R. 1 Sid. 101. Ca. Ch. 18.

[But though a subsisting lease cannot be proved to have been surrendered, yet if the new lease has been uniformly acted under, a surrender of the first shall be presumed, and the second be considered as a lease in possession. Ambler, 748.]

[Where *tenant for life* has a power to grant leases "in possession, but not by way of reversion or future interest," a lease *per verba de presenti* is not contrary to the power, though the estate at the time of making the lease was held by tenants at will, or from year to year, if, at the time, they received directions from the grantor of the lease to pay their rent to the lessee. Doug. 565.]

So, if part of the lease be in reversion, the whole lease shall be void. 3 Sal. 276.

So, if the power be to make leases in possession, or in reversion, he cannot make a lease in possession, and another lease of the same land in reversion; but his power to lease in reversion extends only to make leases of the land, which was not then in possession. Per Holt, M. 9 W. 3. inter Winter and Loveday. (1 Ld. Ray. 269. 2 Sal. 537.)

So, a power to make leases in reversion does not warrant a lease to commence at a future day, but only a lease to commence at the end of an estate then *in esse*. Per Holt, M. 9 W. 3. (1 Ld. Ray. 269. 2 Sal. 537.)

So, a power to make a lease for three lives or 30 years in possession, or for two lives or 30 years in reversion, warrants only a concurrent lease for two lives; for a lease for lives cannot commence at a future day. Per Holt, M. 9 W. 3. inter Winter and Loveday. (1 Ld. Ray. 269. 2 Sal. 537.)

But if a power be annexed to the estate of him in reversion, to make leases generally, he may make a lease *in presenti* of the reversion. R. 1 Lev. 168.

Though the power be to make leases in possession. Dub. Ca. Ch. 18, Acc. per Keeling, but two J. cont. 1 Lev. 168. and it was admitted cont. 1 Sid. 260, 261.

So, if a fine be to the conusee for 15 years, afterwards to B. for life, &c. with power to lease for three lives, or 21 years in possession; he may make a lease during the 15 years, of land in lease at the time

of the fine, when such lease expires. *Per Coke*, 2 *Rol.* 260. *l.* 50. 2 *Cro.* 347. 2 *Bul.* 216. 1 *Rol.* 12.

So, if husband and wife lease pursuant to the *st.* 32 *H.* 8. and then, by act of parliament, the estate is settled to the husband for life, with power to lease for three lives or 21 years; he may make leases of the reversion during the first lease by husband and wife. 2 *Rol.* 261. *l.* 15. *Semb.* 1 *Leo.* 36. *Per two J. Monson cont. Dy.* 357. *a.*

So, if a power be to make leases in reversion for three lives, &c. he may lease for three lives, when there is another life *in esse*, though the power does not say, to make leases of the reversion; for there is no prejudice. *R.* 2 *Rol.* 261. *l.* 30.

So, he may make a lease for years determinable upon three lives, to commence after the end of the former lease *in esse*. *R.* 8 *C.* 70.

[The intent of the parties who gave the powers, ought to govern every construction of them. *Taylor v. Horde*, *H.* 30 *G.* 2. 1 *B. M.* 60. 120. *Dougl.* 573. 3 *T. R.* 665.]

[The plan of the power to make leases, is for the mutual advantage of possessor and successor. *Taylor v. Horde*, *H.* 30 *G.* 2. 1 *B. M.* 60.]

[If a man devise lands to trustees for payment of debts, then in trust for *A.* for life, then to his first and other sons, then to *B.* for life, then to his first and other sons; then to *C.* &c., in like manner remainder to his own right heirs, with a power to trustees to raise money for debts, by letting leases for 31 years, in possession and reversion, and after debts paid, whoever should be seised might make 31 years lease. *B.* dies in devisor's life, who makes codicil, declaring his will should remain, in all but the particulars expressed; and gives part of his lands to *A.* for life, with remainders over, *with such powers as by his will devised*; and gives other lands to *D.* (the son of *B.*) for life, then to his first and other sons, then to his daughters, then to *A.* (who is devisor's brother) for life, then to his first and other sons, remainder to such persons and with such powers, as his other estate devised to him is appointed to go. *D.* has a power to grant 31 years leases. On error from Ireland. *Foster v. Graham*, (*Ld. Anglesey's case*), *H.* 7 *G.* 2. *Str.* 962.]

(B 2.) Of Lands usually demised.

So, if a power be to make leases of lands usually demised, he cannot lease land only once demised. 2 *Rol.* 262. *l.* 2. *R. Vau.* 33. *Vide Estates*, (B 32.—G 4, 5.)

Though it was demised from year to year, for so many years, or for three lives; for it was but one single contract. *R.* 2 *Rol.* 262. *l.* 3.

If a power be, to lease all, or any of the premises, which at any time heretofore have been usually letten, reserving the rents now paid, or more; a demise of lands, not leased within twenty years, is not within the power, though demised. *Temp. Eliz. R. Vau.* 33.

If a power be to lease, rendring the ancient rent, he cannot lease lands, never demised; for no ancient rent can be reserved. *R. Mo.* 198. *Per Vau.* 35. *R.* 2 *Mod. Ca.* 250. 381.

But he may lease lands demised two or three times. *R.* 2 *Rol.* 261. *l.* 50. *Vau.* 33.

[Under the settlement of an estate with a power to the tenant in possession to let all or any part of the premises, so as the usual rents be

be reserved, a lease of tithes which had never been let before was held void. *Pomery v. Partington*, B. R. T. 30 Geo. 3. 3 T. R. 665.]

[Land settled in a family settlement for a term determinable on lives, shall so far be esteemed lands *usually letten or demised*. 1 Bl. Rep. 446.]

[Under a power "to lease all *manors*, messuages, lands, &c. so as there be reserved as much *rent* as is now paid for the same," such parts of the estates enumerated in the power, as have never been demised, may be let. *Doug.* 565.]

[But in a family settlement of an estate consisting of some ground always occupied with the family seat, and of lands *let* to tenants on rents reserved, the qualification annexed to the power of leasing, "that the ancient rent must be reserved," excludes the mansion-house and lands about it never let. *Id.* 574.]

[Settlement of lands to the use of husband for life, then to the wife for life, proviso, that they, during their joint lives, and the survivor in possession, may make leases of premises, *at the yearly rents the same are now let at*. The wife marries second husband, and they demise the capital mansion-house and demesne lands, never before leased. *R. per B. R.* that this is a void lease; and *dubitatur*, whether she could lease on her second marriage. *Bagot v. Oughton*, P. 10 G. Fort. 332.]

So, if a power be to make leases, so that he do not lease the demesne lands of the manor, he cannot make leases of copyholds; for they are part of the demesnes. *Per three J. inter Winter and Loveday; Rookby cont.* for it seemed to him, that the exception extends only to lands in his own occupation. *Sal.* 537. (1 *Ld. Raym.* 269.)

But a lease may be of the rents or services of a manor; for they are not part of the demesnes. *Per Holt, inter Winter and Loveday.* (1 *Ld. Raym.* 270. *Sal.* 538.)

(B 3.) Where the ancient Rent is reserved.

So, if a power be to make leases, so that the ancient rent be reserved, if he does not reserve the ancient rent, the lease will be void. *Vide post.* (C 6.)

And therefore if he, not having counterparts of the ancient leases, leased all his lands anciently demised, rendering the ancient rents, without mentioning what lands, and what rents, in particular; it will be void. *Per Cowper and Trevor, Holt cont.* 2 *Ver.* 534. 544. *Eq. Ca.* 14, 15. (2d Part of 2 *Mod. Ca.*)

But if a power be to lease the premises, or any part of them, so that such rent or more be reserved, as was paid within two years before; he may lease lands not demised *omnino*, reserving such rent as he pleases; for the intent appears, that all may be demised. *R.* 2 *Rol.* 262. l. 10.

So, if a power be to lease the premises, (which consist of land, a rectory, &c.) or any part of them, reserving so much *per acre*; he may demise the rectory, though there cannot be a reservation of such a sum *per acre*. *R.* 1 *Vent.* 294. - 2 *Lev.* 150.

If a power be to demise, rendering 12 s. *per ann.*; a lease rendering *so much as ought to be paid by the power*, without saying how much, will be good. *R.* 2 *Ver.* 533.

If a power be to make leases, rendring such rent as he pleases; a lease without rent will be good. *R. Skin. 427, 8.*

If a lease by tenant for life reserves the rent to him and his heirs, it will be good. *R. 8 Co. 70. b.*

If a lease be of such land *inter alia*, reserving the ancient rent *proinde*, the word *proinde* shall be referred to the land mentioned. *R. 1 Vent. 340.*

[The successor must not be prejudiced in point of remedy, or any circumstance of full enjoyment. *Taylor v. Horde, H. 30 Geo. 2, 1 B. M. 60.*]

[If the ancient rent is to be reserved, it must be with all beneficial circumstances; and *specifically*, that remainder-man be put to no difficulty in avowing; otherwise void against him, though good against owner of the inheritance. *Ibid.*]

[The lease intended by every power of leasing, is the *usual husbandry lease*, reserving a rack-rent. *Ibid.*]

(B 4.) For Lives, or Years.

If the power be to make leases for three lives, or 21 years, he cannot make a lease for 99 years, if three lives so long live; for the power shall be taken strictly. *R. 8 Co. 70. b. 2 Rol. 260. l. 40.*

But a power to make leases, not exceeding three lives or 21 years, warrants a lease for years, if three lives so long live; for that does not exceed three lives. *R. 8 Co. 70. b. 2 Rol. 260. l. 45.*

So, a power to make leases for three lives, or 21 years, or for any term upon one, two, or three lives. *R. 3 Mod. 269.*

So, a power to make leases for three lives, or for 30 years, or for any number of years determinable upon three lives, warrants a lease for 30 years absolute; for the repetition of the words [*or for*] makes distinct clauses. *Per three J. Rookby cont. Winter and Loveday, Sal. 537. (1 Ld. Ray. 269.)*

If a power be to make leases, rendring the rent now paid, or more, for 21 years, or for years determinable upon one, two, or three lives in possession, *so long as the lessees duly pay the rents and perform the conditions*; that clause is a limitation, which determines the lease, if the rent, &c. be not paid, though there be no demand of the rent. *R. Vau. 32.*

[If tenant for life in possession has a power to limit lands to his wife for life, he cannot make a lease of them for 99 years determinable on her death. *Rattle v. Popham, M. 8 Geo. 2. Str. 992.*]

[Under a power of leasing for one, two, or three lives, or for any term of years determinable on one, two, or three lives, such lands as were then demised for any such term, lands are not included which were then held under a demise "to *W.* and *G.* for 99 years, if *W.* and his widow and any eldest son living or in *ventre sa mere* at the time of his (*W.*'s) death, or if no son, any eldest daughter then living or in *ventre sa mere*, or any or either of those three, *viz.* of the said *W.* and such his wife, son, or daughter should so long live, remainder to the said *G.* and his widow, son or daughter in the same manner;" of which description of persons five were in fact living at the time of the power reserved, who were all entitled in succession, three at a time to come in under the lease. Under such a general power the three lives

lives must be certain and co-existing. *Wyndham v. Halcombe, B. R. T. 38 Geo. 3. 7 T. R. 713.*

(C) How it shall be executed.

(C 1.) What shall be a good Execution.

(C 1.) *Though more join in* **I** *F a power be to a woman to make leases, the execution than need.]* and she takes husband, a lease by the husband and wife, is well executed. *R. 1 Sid. 101. R. cont. Ca. Ch. 18. R. acc. 1 Rol. 329. l. 35. Acc. where it is a naked power. 3 Salk. 276. Vide Chancery, (4 H 1, &c.)—Uses, (L 4, 5.)*

So, if an use be to *A.* for life, and afterwards to *B.* his son, in tail, with a power for *A.* to charge the land with 2000*l.* for portions; if *A.* and *B.* by deed charge, &c. it will be good. *R. 1 Lev 150.*

(C 2.) *Or more be done than the power requires.]* So, if a man, who has a power, does all required by his power, and more, it will be good for so much as was within his power; as if a tenant for life, who has a power to make a jointure, covenants to stand seised to the use of him and his wife for their lives, and then to the issue of their bodies; it is a good execution of the power to make a jointure. *R. 2 Lev. 60. Dub. 1 Leo. 148.*

[So, where *A.*, having a power to limit an estate to the use of such child or children of the said *A.* and for such estate or estates as she should direct, limit, &c. and having two daughters, as to one moiety of the said estate, appointed it to the use of her eldest daughter *B.* for life, with remainder to first and other sons of *B.* in tail male, &c.; remainder to her younger daughter *C.* for life; remainder to first and other sons of *C.* &c.; and *vice versa* as to the other moiety. This appointment, though an excess of *A.*'s power with respect to the limitation to her grandchildren, was held good as to the limitation to her daughters for life. *Cowp. 651. 657.]*

[So, where by marriage-articles the husband had power of appointment to any one or more children of the marriage, and by deed of appointment in which his eldest son joined, he appointed part of his estate to his eldest son and his issue, and it was held good, for he might have appointed absolutely to his eldest son, and the latter, on his being so appointed, might have immediately afterwards settled it in that manner. *Ambler, 289.]*

[But where the son does not join, an appointment to him for life, remainder to his sons in tail, under a power of appointing among children, is not a good execution of the power. *Vide Robinson v. Hardcastle, 2 Brown. 22. 344. Vide S. C. 2 Term Rep. 241. 380. 781. Pitt v. Jackson, 2 Brown. 51.]*

[If a man has power to appoint lands to his wife for her natural life, and he by deed grants them to trustees, for the use of his wife for life, and then to the use of the heirs of her body, the deed is void to raise any use, but it shall enure as an appointment. *Peters v. Morehead, M. 4 Geo. 2. Fort. 339.]*

If a man, having power to make leases for ten years, leases for twenty years, it will be good in equity for ten years. *R. Ca. Ch. 23. Semb. cont. per Raymond, Ch. J.*

[So, where tenant for life had power to let leases for 21 years in possession, and he made a lease for 26 years without referring to the power; it was held that the first lease should be presumed to have been surrendered, and the remainder-man should be bound for 21 years of the new lease. *Ambler*, 740.]

(C 3.) *Or if it be done by more deeds.*] So, if a man pursues all the requisites within his power, though he does it by more deeds than are necessary, it will be good; as, if a man has a power to charge land with 2000*l.* by his deed, for portions, &c. if he makes the charge by lease and release, it will be good, though the power says, *by deed*, and it be executed by two deeds. *R. 1 Lev. 150. Hard. 395.*

[A power to make provision for younger children by deed, may be executed by will. *Ambl. 64.*]

If done by deed, to declare the uses of a fine, and a fine pursuant. *R. 1 Vent. 279. Ray. 239. 2 Lev. 149.*

[But where a wife under a marriage-agreement had power to dispose of her estate by deed or will after her decease, and the husband covenanted to confirm it; afterwards the wife, *by lease and release*, reciting the articles, conveyed her estate to trustees after her death to the use of her natural son for life, with remainder over, Afterwards the husband and wife levied a fine of the premises, and declared the uses different from those of the release; it was held that the lease and release were not good to pass the estate either as a conveyance or as an execution of a power, and that the estate passed by the fine. *Ambler*, 467, 468. But it is said, this was decided on the principle that there was no meritorious consideration. *Ambl. 474.*]

[For, in favour of a person having a meritorious consideration, it was afterwards determined, that where a woman by marriage-articles reserved to herself a power of disposing of her present or any future estate real or personal by deed or will, and she *devise*d an estate which was in trustees, this was held a good execution of the power, *Id. 468.*]

[So, where the *legal* estate was in the wife, such a power was held to be well executed by devise. *Id. 565.*]

So, the execution of a power may be without deed, where that is not expressly required; for the interest arises out of the estate. *R. Sal. 467.*]

[If a man has a power to appoint to a wife for her life, for or in the name or in lieu of jointure, all or any part of lands, it is not necessary it should be executed all at once. *Zouch v. Woolston, P. 1 G 3. 2 B. M. 1136. 1 Bl. Rep. 281.*

[If previous to his marriage, he by indenture doth according to the power to him given, and by virtue thereof, and of all and every other power, appoint to trustees part of the lands to the use of his wife for life, *for and in the name and in lieu of jointure*, and there is a proviso, that if she does not on three months request release her dower, this to be void; which proviso he releases, he may appoint other part of the lands as augmentation of jointure. *Ibid.*]

[A power to raise portions, may be executed at several times, provided the first execution be not meant as a complete execution; and the party, in the whole execution, do not transgress the limits of the power. *2 Term Rep. 721.*]

(C 4.) *Or if it be executed without mentioning his power.*] So, if a man executes a power by deed without taking notice of his power, it will be good, where the deed has no operation, if it be not in execution of his power; as if a man settles two parts of his land, and afterwards makes a feoffment of the third part held *in capite*, to the use of such person, &c. as he shall appoint by his will, and afterwards devises that third part, without reference to the feoffment; it will be a good declaration of the uses of the feoffment, for otherwise, the devise will be void, two parts being settled before. *R. 6 Co. 18. a.*

So, if a man has a power to charge lands with the payment of 2000*l.* and he, being tenant for life, with his son tenant in tail, by lease and release, without reference to the power, conveys the land for raising of the money, it will be good. *R. 1 Lev. 151. cont. per Bridgman, afterwards in Chancery. 2 Leo. 152. in marg.*

So, if the deed has not a full operation, except where it is in execution of his power; as, if tenant for life makes a lease, without taking notice of his power, it shall be an execution of his power to make leases; for otherwise the lease will not have an effectual continuance. *R. 1 Vent. 228. Vid. Ambler, 740.*

If a devisee for life has power to sell the reversion, and he sells by bargain and sale inrolled, without taking notice of the power; it shall be an execution of the power; for otherwise, nothing would pass but his estate for life. *R. 1 Rol. 329. l. 45. Jon. 327.*

[But where a testator having a power over 3000*l.* originally the property of his wife, gave several legacies; and then, after the decease of his wife, gave the residue over, and his estate was not sufficient to pay the legacies; yet it was held that the will was no execution of the power, the same not being referred to, and there not being any thing by which an intention appeared in the testator to execute it. *2 Brown. 297.*]

(C 5.) *If it be executed by a conveyance tantamount, tho' not pursuant to the letter of the power.*] So, if a man, who has a power, does not observe all circumstances required by law, for making such estate, yet it may be a good execution of his power; for the estate made by virtue of the power, arises out of the first estate upon which the power was created; as, if tenant for life, with power to make a jointure, covenant to stand seised to the use of his wife, it will be a good jointure. *Ray. 239.*

If tenant for life, who has a power to make leases for lives, makes a lease for life without livery, it is good, and better than if there was livery. *Per Hale, 1 Vent. 281. 2 Lev. 149.*

So, it is good, if there be also livery. *1 Vent. 281. 2 Lev. 149.*

[A power to make leases for years determinable on lives, may be executed by a covenant to stand seised. *Right v. Thomas, M. 4 G. 3. 3 B. M. 1441.*]

If a man has a power to make an estate to his children, and he grants a rent-charge to them, by his will, out of the same estate, it will be good. *R. 3 Ca. Ch. 69.*

If he has power to make it by writing, signed before two witnesses, and he grants a rent by his will, executed before two witnesses; though it be not a good execution of the will, for want of three witnesses, within the *st. 29 Car. 2.* yet it shall take effect as an execution of the power. *R. 3 Ca. Ch. 69.*

If

If an executor, who has only power to sell, makes a feoffment, it will be a good execution of the power. *1 Rol. 330. l. 1.*

If a wife has power to dispose by writing under hand and seal; by writing in nature of a will, signed and sealed, will be good. *R. Cro. Car. 376.*

So, if it be by writing under hand and seal, delivered in the presence of three witnesses; by will signed, sealed, and published, before three witnesses, is sufficient, though delivery is required by the power. *Hob. 312. 1 Vent. 280.*

[A power to appoint by deed executed in the presence of two witnesses is ill executed by a will; otherwise if the power be to appoint by any writing or instrument, or other general term. *Cowp. 260.*]

[If a power to be executed by deed attested by three witnesses be executed in consideration of marriage, by deed attested by two witnesses only; this defect in the execution of the power, shall be supplied by a court of equity. *1 Brown. 363.*]

[A will under a power, not attested to pass real estate, is a good execution of the power as to the personalty. *Id. 147.*]

[If a feme covert, having a power to dispose of 300*l.* by will, signed and sealed by her, make a testamentary paper, not sealed, but on a stamp; this is equivalent to sealing, and is a good execution of the power. *2 Brown. 585.*]

[A power to appoint a schoolmaster to an ancient foundation given to the vicar and churchwardens, (of whom there were eleven,) and in case of their neglect in appointing, then to devolve to two corporate bodies in succession, and to result in the *dernier resort* to the same vicar and churchwardens, to whom also the general power of managing the trust was committed, is well executed by the vicar and a majority of the churchwardens; especially if such election be supported by usage. *Witbrell v. Gartham, B. R. T. 35 Geo. 3. 6 T. R. 388.*]

[Devise of real estate to be sold, and the produce with the personal, to testator's wife for life, with power to appoint a moiety by deed or will, with two or more witnesses. The estate was not sold: the wife having no other real estate, by will with three witnesses, gave specific legacies, some of which she described to have been her husband's, and all the rest, residue, and remainder of her estate and effects, of what nature or kind soever, and whether real or personal, and all her plate, china, linen, and other utensils, which she should be possessed of, interested in, or entitled to at her decease: the power held to be well executed by the residuary clause. *Standen v. Standen, 2 Vez. jun. 589.*]

[Under marriage-articles 15,000*l.* was vested in trustees on trust together with 5000*l.* covenanted by the husband to be paid, to be laid out in land, to be settled upon the husband for life; remainder to the wife for life; remainder to the children, subject to such powers, limitations, and provisos, as the husband and wife, or the survivor, should appoint; in default of appointment, to the children in tail; in default of issue, to the husband in fee. The husband and wife joined in a direction to the trustees, reciting their resolution to invest the trust-fund in an estate lately purchased by the husband for 16,300*l.* and directing them to deliver the said stock, &c. to him at the price they were at on the day of the purchase; which was done. The wife died. There were two daughters. The father by will reciting the purchase,

purchase, and that he had not conveyed it to the uses of the settlement, and that it was not his intention that the said purchase should be an investment of the trust-fund, but that the said fund with its increase should be taken out of his personal estate, gave 10,000*l.* part of the trust-fund, in trust to be laid out in land to be conveyed to one daughter for life, for her separate use; remainder to her children in tail; remainder to the other daughter in fee; for whom he also appointed the residue of the fund, but revoked that by codicil reciting a portion given on her marriage. Held, 1st, that grandchildren are not objects of the power, but the excess only was void: 2dly, the fund with its increase was invested in the purchase: 3dly, there was no appointment of the estate, or money due on the covenant: 4thly, the remainders in default of appointment were vested, subject to be divested by appointment, and would take effect as to what was ill appointed, or unappointed: 5thly, the share of the daughter, to whom portion was advanced on marriage, was thereby satisfied. *Smith v. Lord Camelford*, 2 *Vez. jun.* 698. Father having power to appoint among children, and purchasing the share of one, cannot by appointment entitle himself to more than the share of that child, in default of appointment. *Ibid.* 714.]

(C 6.) What not.

But a power ought to be strictly pursued; and therefore, if all circumstances are not observed, it will be a void execution of it; as if a power be to make leases, rendering the ancient rent, a lease which does not reserve it, will be void; as if he leases two acres with other land, and reserves the rent of the two acres for the whole. *R. 2 Jon.* 111. *Vide ante*, (B 3.)—*Estates*, (G 5.)

[The lease of a tenant for life with power of leasing under certain conditions must strictly comply with those conditions; and if it vary from them in the interest demised, or the rent reserved, it cannot be supported against the remainder-man. *Pulteney v. Cavan*, *B. R. E.* 34 *Geo.* 3. 5 *T. R.* 567.]

[A tenant for life, having power to grant building-leases for 61 years reserving the best improved ground-rent, granted a lease for that term, which was not expressed to be a building-lease, but which contained a covenant by the lessee to keep in repair the premises demised, (old houses,) or such other house as should be built during the term; and it was holden that this was not a building-lease within the power. *Jones v. Verney*, *C. P. T.* 12 & 13 *Geo.* 2. *Willes*, 169.]

[Such a lease, being void, was incapable of being confirmed by the remainder-man's acceptance of rent. *Ibid.*]

[Where the power is only to revoke, no new uses can be declared under that power, though the party might have done it by a new conveyance, or by new grant or covenant on consideration, in the same. *Anon. P.* 10 *G. C. B. Str.* 584.]

[If *A.* surrenders copyhold to trustees to the use of his wife for his life, then to pay the profits to his children equally, then to such uses as he shall appoint, and for want of appointment to *B.*, and by his will gives all the rest of his estate, real and personal, of what nature, kind and quality whatsoever, to *C.* in bar of what he may claim by custom or otherwise; it is not a good execution; for though he need not re-
cite

cite the power, he must mention the estate. *Semb. ex parte Caswell T. 1744, 1 Atkyns, 559*]

So, if a power be to revoke under hand and seal, a revocation under seal only is not sufficient. *Pal. 112.*

[If *A.* devises the income and produce of 1000*l.* *South-Sea* stock to *B.* for life, with a power to dispose of 400*l.* of it by writing before three witnesses, and for want of appointment gives the 400*l.* to a charity, and *B.* makes his will, and after legacies gives the rest and residue of his personal estate to, &c.; this is not a good execution of the power; and parol evidence shall not be allowed to prove that *B.* intended the 400*l.* should pass. *Molton v. Hutchinson, 1739, 1 Atkyns, 558.*]

[If a wife has a power by settlement before marriage to appoint money by her will in writing, or other writing under hand and seal, attested by two witnesses, and dies, leaving a paper in her handwriting, but not signed, sealed, nor attested; this is not a good execution. *Ross v. Ewer, T. 1744, 3 Atkyns, 156.*]

So, if a man has a power to charge 2000*l.* upon land, and he, by lease and release, conveys in fee, upon condition to be void, upon payment of 2000*l.* and interest; it shall be void for the whole: for he had not authority to raise more than 2000*l.*, and it shall not be good for part, and void for the residue at law; for the power is intire, and so ought to be the execution of it. *R. 1 Lev. 151. Hard. 398. Cont. R. Sal. 538.*

[If *A.* in his son *B.*'s marriage-settlement covenants to stand seised, after other remainders, to the use of children of the marriage, in such manner, for such estates in fee or tail, and upon such conditions as *B.* shall appoint, and in default, &c. over; and *B.* by will appoints to his eldest son *C.* and the heirs of his body for ever, and for want of such issue, to the right heirs of *B.* this is a void appointment; for he has not appointed the whole among the children of the marriage, giving only estate-tail to *C.* and the fee to his own right heirs, who might not be children of that marriage, and the contingent remainder to such children is not defeated. *Goodtitle v. Weal, H. 8 G. 3. 2 Willf. 369.*]

If he has power to make a lease for 31 years for raising portions, and he makes a bargain and sale in fee. *Semb. Hard. 413.*

But if a man, having a power of revocation, makes a mortgage in fee; it shall be a revocation for the mortgage only. *1 Ver. 141. 182.*

[Powers shall not be exceeded, nor their conditions evaded, but shall be strictly pursued in form and in substance, and all acts done under a special authority, not agreeable to it, nor warranted by it, are void. *Taylor v. Horde, H. 30 G. 2. 1 B. M. 60. Vid. Doug. 565—575.*]

[It is no lease, unless landlord and tenant are bound in mutual stipulations. *Ibid.*]

[If the lessee never executed counterpart, nor entered, nor covenanted to pay rent, nor consented, nor accepted lease, nor was in possession of it, he never was bound by it, and such lease is no execution of a power, especially if there is no clause of re-entry. *Ibid.*]

[Every fraudulent, unfair, prejudicial execution of a power in respect of those in remainder is void. *Ibid.*]

[But it is good, though made in trust for him who executes the power, provided the legal tenant be bound in all requisite covenants and conditions. *Ibid.*]

[Under

[Under a power to a tenant for life to lease for years, reserving the usual covenants, &c. a lease made by him, containing a proviso, that in case the premises were blown down or burned the lessor should rebuild, otherwise the rent should cease, is void; if the jury find that such covenant is unusual. 1 *Term Rep.* 705.]

[If one who has a power to jointure, execute it to the full extent; but it be agreed that the wife shall have only a part by the year, and that the rest of the rents shall go to pay his debts, and then as he shall appoint; this will be fraudulent against the remainder-man, except as to the part actually given to the wife. *Ambler*, 233.]

[So, if an estate be settled after the death of father and mother, on such child, as the father, with the consent of trustees, shall appoint; and on default, then on the first, &c. sons; if the father by misrepresentation prevail on the trustees to consent to his appointing to his younger son, the appointment will be set aside. *Ambler*, 272.]

[So if a power in a marriage-settlement be created to the husband, to appoint the settled estate among the children, in such manner as he shall think proper, not exceeding estates tail; and he appoint to two of the children, one acre for their lives and the life of the survivor, then to fall into the residue, which he appoints to his second son for life, with remainders over; this execution is elusory and bad. 1 *Brown*. 450.]

[A power under a settlement to appoint to the children of the marriage is strictly confined to those children. 2 *Wilf.* 369.]

[And a father having a power to appoint portions to younger children to be raised at all events, cannot annex a condition to the appointment of any child's share, 1 *Wilf.* 224. under a power of appointing a real estate to the use of such child and children, &c. "and in default of appointment, the estate to be settled, to the use of all and every the child and children," an exclusive appointment to one is good. 1 *Term Rep.* 432.]

[So, under a power of appointing real and personal estate, "to and among such of the testator's relations as shall be living at the time of his death, in such parts, shares, and proportions, &c." an exclusive appointment to one is good. *Id.* 435. n.]

(D) How it shall be destroyed.

IF tenant for life, who has a power to make leases, jointure, &c. levies a fine, suffers a recovery, or makes a feoffment, by which his estate is forfeited, his power shall be extinct. R. 1 *Vent.* 226, &c. 3 *Salk.* 276. *Vide Uses*, (L 1, &c. 6.)

So, if tenant in tail, who has power to make a jointure, &c. suffers a recovery, his power shall be extinct. R. 2 *Lev.* 60.

So, if he releases his power to the tenant of the freehold. R. 1 *Co.* 113. a. 174. a. *Vide Uses*, (L 6.)

So, a power in gross, not annexed to an estate, fully may be destroyed by fine, feoffment, &c. as if tenant for life has power to make a lease to commence after his death. *Hard.* 415.

So, by a release with apt words. *Hard.* 416.

[So, a power shall not be executed, after the party for whose benefit it was created is dead. Thus where a power was given by marriage-settlement to the husband to raise 10,000*l.* for a single younger

younger child *when he should think proper*; the child, a female, being 14 years old, he called on the trustees to raise the portion immediately, and afterwards, the child being dead, filed his bill to have it raised as her administrator; the bill was dismissed. *1 Brown. 395.*]

[Or an appointment under a power may be revoked if made revocable by the deed of appointment, or without being revocable, if the first appointment was by will, which is in its nature revocable. *1 Brown. 533.*]

(E) When it shall not be destroyed.

BUT if a power be given to a lessee for years, and his assigns, to make leases for lives, such power goes to his executor, though only an assignee in law. *R. 2 Jon. 110. Vide ante, (A 1.)*

Or to the assignee of the executor. (*R. 2 Jon. 110.*)

But a power to an executor to make leases, does not extend to the executor of his executor. *2 Jon. 110.*

So, if tenant for life with power to make leases, jointure, &c. makes a conveyance, which does not operate by transmutation of the possession, but only by limitation of the use, the power shall not be destroyed; as, if he covenant to stand seised to the use of another in fee. *Dub. Hard. 413.*

Or make a bargain and sale to another in fee by indenture inrolled, *Semb. Hard. 413.* And if it be a power in gross. *R. Hard. 417.*

Though the tenant for life had also the remainder in fee, which passed by the bargain and sale; for till the remainder comes *in esse* in possession, the estate by the power is not touched. *R. Hard. 416.*

[Though a tenant for life with power to grant leases in possession for 21 years, convey his life-estate to pay an annuity for his life, and the surplus to himself, he may still grant leases agreeably to the terms of the power. *Doug. 292.*]

So, a power in gross which does not take effect till the estate of him, who had the power, determines, shall not be destroyed by alteration of the estate; as, if tenant for life, with such power, grant *totum statum*. *Per Hale, Hard. 416.*

So, if *A.* settles land to the use of himself for life, with power to make leases, and afterwards to *B.* upon such trust as he shall afterwards declare; if *A.* declares the trust for payment of debts, and afterwards leases at a small rent, the lease is not defeated by the execution of his power; for it is precedent to it. *R. Skin. 427.*

So, an act by a stranger does not destroy a power; as if bargainee of tenant for life with power, &c. enfeoffs him in fee, the power is not thereby destroyed. *Semb. Hard. 413. 417.*

So, if tenant for life, with a power in gross, be disseised, the power is not destroyed; for the right of the tenant for life supports the power, and if he makes a lease pursuant to the power, and afterwards re-enters, it will be good. *R. Hard. 417.*

If a man having a power annexed to his estate, charges his estate, and afterwards executes his power, the estate which arises by the execution of the power shall be subject to the charge during the estate; as, if tenant for life, with power to make leases, grants a rent-charge, and afterwards makes a lease, the lessee shall take, subject to the rent-charge during the life of the lessor. *Per Hale, Hard. 415.*

[An estate being conveyed, by marriage-settlement, to *trustees*, to the use of the husband *for life*, with remainders over, and with a power to the husband with the consent of the trustees to revoke *all* the uses in the settlement, and the husband having granted an estate for his own life for *valuable consideration*, in the settled estate, a *revocation* subsequent thereto of *all* the uses, executed by him with the consent of the trustees, and a conveyance of the estate, to a purchaser for *valuable consideration* also, but with *notice* of the prior grant for the husband's life, shall not affect the interest granted for his life. *Doug.* 477. 486.]

(F) How the Pleading shall be.

IF a man pleads an act done, pursuant to a power, he ought to shew the power to be strictly pursued in all circumstances.

If he says, that it was executed in the presence of three credible witnesses, he ought to shew who were the witnesses by name. *D.* 1 *Co.* 111. *a.*

[(G) When it cannot be executed.]

IF there be a power under a marriage-settlement to give to the children of the marriage in such shares, &c. and for such estate, &c. and there be but one child of the marriage, such child must have the whole estate settled. 2 *Wilf.* 336. 2 *Brown.* 588.]

POLICY OF ASSURANCE.

Vide Merchant, (E 9, 10.)

P O L L S.

Vide Challenge, (C 1, 2.)

P O L Y G A M Y.

Vide Justices, (S 5.)

P O N E.

Vide Pleader, (3 K 6.)

P O N T A G E.

Vide Toll.

P O O R.

Vide Forma Pauperis—*Justices of Peace*, (B 64, &c.)—*Uses*, (N 1. 7. 10.)

P O P E.

Vide Ecclesiastical Persons, (B 1.)—*Justices*, (K 9.)—*Popery*.

P O P E R Y.

(A) The Authority of the Pope; how usurped.

(A 1.) In giving the Pall.

WHAT authority the pope had in this kingdom, *vide Ecclesiastical Persons*, (B 1.)

Before the time of *William the Conqueror*, the pope had not any jurisdiction allowed within the realm among the *Britons* or *Saxons*. *Dav. 87, 88.*

But in the time of *William the Conqueror*, the pope usurped upon the bishops, to take their palls from him. *Dav. 89.*

And if an archbishop or bishop did not do it, he was deposed. *Ibid.*

(A 2.) In sending his Legates.

So, in the time of *William the Conqueror*, the pope sent his legates to *England*. *Dav. 89.*

But in the time of *H. 1.* it was allowed that the archbishop of *Canterbury* should be *legatus natus*. *Dav. 90.*

And that no other legate should be sent by the pope, without the king's request. *Dav. 90. b.*

(A 3.) In receiving Appeals.

So, in the time of *Will. 2.* and before, no appeal to *Rome* was admitted. *Dav. 89. b. Vide post. (B 2.)*

But, in the time of *Stephen*, appeals to *Rome* were usurped. *Dav. 90.*

And by canon in the synod of *London*, before *H.* bishop of *Winchester*, the pope's legate, it was decreed, that an appeal should lie from a provincial council to the pope. *Dav. 90. b.*

(A 4.) In exempting of Clerks.

So, in the time of *H. 2.* the pope usurped the exemption of clerks from the secular power. *Dav. 91.*

And a clerk indicted for murder prayed his clergy, and was sent to the bishop of *Sarum*, his ordinary, to make his purgation; which if he did not, he ought to have been remanded to the temporal court; but he sent him to *Thomas Becket*, the archbishop, and by him he was thrust into an abbey to shelter him from justice. *Dav. 91.*

(A 5.) In exacting Tenths and First-Fruits.

So, by the pope *Boniface* the 9th, or *John 22*, payment of tenths and first-fruits was imposed upon all archbishops and bishops. *Vide Tenths (A—B).*

(B 1.) How the Usurpation of the Pope has been restrained.

HOW provision to benefices by the pope was restrained, *vide Provisor*, (A 2.)

How

How the ecclesiastical jurisdiction and supremacy of the king has been maintained, *vide Prærogative*, (D 9, &c. 17.)

The kings of *England* have always disallowed the encroachments and usurpations of the pope, and the court of *Rome*.

And therefore the pope was not allowed to annul the temporal law, by his bull. 11 *H. 4.* 37.

A fortiori, not the statute law. 2 *Cro.* 517.

All dispensations by him, contrary to law, were void. *Ibid.*

So, the dissolution of a perpetual vicarage, after the *st.* 4 *H. 4.* 12. *R.* 2 *Cro.* 517.

The dissolution of a spiritual corporation; for, *quoad* the corporation, it is temporal. *Vide* 2 *Cro.* 517.

(B 2.) In Appeals to *Rome*.

So, *William Rufus* rejected and refused all appeals to *Rome*. *Dav.* 89. *b.* 4 *Inst.* 341. *Vide ante*, (A 3.)

And though king *Stephen* allowed them, yet, by the constitution of *Clarendon*, in the time of *H. 2.* it was ordained, that all appeals should be from the archdeacon to the ordinary, from him to the metropolitan, from him to the king. *Dav.* 91. 4 *Inst.* 340.

And by a canon, that no decree of the pope should be executed within the realm, upon pain of imprisonment and confiscation of goods. *Vide Dav.* 91.

And now, by the *st.* 24 *H. 8.* 12. if any purchase or procure, in any cause testamentary, matrimonial, of divorce, or tithes, from the see of *Rome*, or other foreign court, any foreign process, appeal, sentence, &c. or execute the same, he shall incur a *premunire*.—So by the *st.* 25 *H. 8.* 19.

And if any prelate, pastor, &c. by occasion of any appeal, &c. refuse to administer sacraments, divine service, &c. he shall have a year's imprisonment, and make fine and ransom at the king's will.

And this act being repealed by the *st.* 1 & 2 *Ph. & M.* 8. was afterwards revived by the *st.* 1 *El.* 1.

(B 3.) By abolishing the Power of the Pope.

By the *st.* 25 *H. 8.* 20. no archbishop, or bishop, shall pay annates, pension, or other sum of money to the see of *Rome*, on pain of losing all his goods, and the possessions of his bishopric.

Nor, shall send there, or procure any bulls, breves, palls, &c. but the same shall cease: by the *st.* 28 *H. 8.* 16. shall be void.

So, by the *st.* 25 *H. 8.* 21. no person in the king's dominions shall pay any pension, cense, Peter-pence, or other imposition to the use of the pope, or see of *Rome*.

And no visitation of any monasteries, colleges, &c. shall be made by authority of the see of *Rome*. By the same *st.* *f.* 20.

And though all statutes for abolishing the authority of the pope were repealed by the *st.* 1 & 2 *Ph. & M.* 8. those statutes were afterwards revived by the *st.* 1 *El.* 1. 4 *Inst.* 325.

And by the *st.* 1 *El.* 1. no foreign prince, person, prelate, &c. shall use any power, jurisdiction, authority, &c. within any of her majesty's dominions, but the same shall be abolished for ever.

All jurisdiction and authority of the pope is now utterly abolished.

So, all jurisdiction derived from him.

And therefore, the concurrent jurisdiction of the archbishop of *Canterbury*, within an inferior diocese, is now taken away; for he had it not as archbishop, but as *legatus natus*, and therefore it was derived from the pope.

But the *st.* 28 *H. 8.* 16. which prohibits the using of a bull of the pope, &c. does not extend to alleging it as an inducement to the demand of a pension in pleading. *R. 2 Lev. 251.*

(B 4.) By a Penalty upon the Maintainers of his Authority.

So, by the *st.* 1 *El. 1.* if any in the queen's dominions, by writing, printing, teaching, &c. by express word or act, advisedly and directly maintain, &c. the authority, &c. spiritual or ecclesiastical, of any foreign prince, prelate, &c. heretofore usurped, &c. for the first offence he shall forfeit all his goods real and personal; and if they are not worth 20 *l.* shall besides suffer a year's imprisonment without bail. And all the benefices or ecclesiastical promotions of any spiritual person so offending, and thereof convict and attain, shall thereby be void; for the second offence, he shall incur a *præmunire*; for the third, shall be guilty of high treason. *Vide Præmunire (B).*

And by the *st.* 5 *El. 1.* for every such offence, being indicted for it within a year, he shall incur a *præmunire*.

If a subject imports books written out of the realm in support of the supremacy of the pope, knowing the effect of them, and sells or utters them secretly to persons conversant of the contents, he shall be within this statute. *R. by all the J. of B. R. and C. B. and the Ch. Baron (except three). Dy. 282. a.*

So, if any one receives and reads such book, and afterwards, by speaking in conversation, allows it. *R. Dy. 282. a.*

But by the *st.* 1 *El. 1.* none shall be impeached for an offence by preaching, teaching, or words, unless within half a year; and if imprisoned for such cause, and not indicted in half a year after the offence, shall be set at liberty.

So, the receiving and reading a book, written in support of the supremacy of the pope, without more, is not within the *st.* 5 *El. 1.* *R. Dy. 282. a.*

Vide Justices, (K 9.—X 1.)

(B 5.) By the Dissolution of Monasteries, and by Oaths.

How the power of the pope was restrained by the dissolution of monasteries, &c. *vide Hospital.—Monastery.*

How by the oaths of allegiance and supremacy, *vide Allegiance, (B 2. &c.)—Justices of Peace, (B 17, 24.)—Officer, (K 7.)*

(B 6.) By the Restraint of Reconciliation to the Pope, and of the Erection of Seminaries.

As to restraining the reconciliation, *vide Justices, (K 9.)*

By the *st.* 1 *Jac. 4.* any under the king's obedience, who shall go, or shall send any child, or other person under his government, beyond the seas, out of the king's obedience, to enter into, or be resident in any

any college, seminary, &c. or repair to the same to be instructed, &c. in the popish religion, shall forfeit 100 l. to his majesty.

And the person, so going or sent in respect of him or herself only, shall be disabled to inherit, purchase, take, or enjoy any lands, &c. goods, debts, legacies in any of his majesty's dominions. *Vide post.* (B 7.)

So, by the *st.* 3 *Car.* 1. 2. any who shall go or send, &c. to any college, seminary, &c. or any private popish family, where he shall be by any popish person instructed, &c. or shall cause to be sent any money, &c. for the maintenance of any child gone or sent, or by way of alms, &c. for any abbey, nunnery, school, &c. shall be disabled to sue in law or equity, to be committee of a ward, executor, or administrator, capable of a legacy, or deed of gift, to bear any office, shall forfeit all his goods and chattels, and all his lands of freehold during life.

So, by the *st.* 3 *Jac.* 5. if the children of any subject, (not soldiers, mariners, merchants, their apprentices or factors,) to prevent good education in *England* or other cause, shall be sent, or go beyond sea, without licence of the king, or six of the privy council, (whereof the principal secretary to be one,) under their hands and seals, such child, &c. shall take no benefit by any gift, conveyance, descent, devise, &c. of any lands, leases, goods, &c. *Vide post.* (B 7.)

And a person sending, &c. without such licence shall forfeit 100 l., one third to the king, one third to him who sues, &c. one third to the poor.

So, a person already gone without licence, &c. who shall not take the oath in six months after return, shall take no benefit by any gift, &c. *By the same statute.*

So, by the *st.* 27 *El.* 2. all jesuits, seminary, or other priests ordained by authority from the see of *Rome*, shall depart the realm; and if any born in the queen's dominions come into, or remain there, such offence shall be high treason.

And if any receive, relieve, &c. any such, knowing him to be so, it shall be felony.

And any who directly, or indirectly, sends relief to such, or to any seminary, or to any there, incurs a *præmunire*.

And every subject, knowing such jesuit, priest, &c. to be in the queen's dominions, and not discovering it to a justice of peace in twelve days, shall make fine, and be imprisoned at the queen's pleasure: and a justice of peace not informing, &c. some of the privy council, &c. in 28 days, forfeits 200 marks.

But this act extends not to a jesuit, &c. who in three days after his arrival submits to an archbishop, bishop, or justice of peace, &c. *By the same statute.*

So, by the *st.* 35 *El.* 2. a jesuit, &c. suspected, being examined by any having authority, and refusing to answer directly, whether jesuit or not, shall be committed without bail, till he make direct answer.

The indictment for treason ought to say, that he was born within the king's dominions.

That he was ordained by the authority of the see of *Rome*.

But it need not say, at what place born, or ordained.

A secretary of state, or the court of *B. R.* may examine any, whether he be a jesuit, &c. 1 *Sal.* 351. *Dub. Skin.* 369.

And ought to make a conviction, if he refuses. 1 *Sal.* 351.

But a commitment generally, till delivered by law, will be ill. *R.* 1 *Sal.* 351. *Skin.* 369.

(B 7.) By Disability.

(B 7.) *To take lands or tenements.*] By the *st.* 1 *Jac.* 4. a person going, or sent into a college, seminary, &c. (*vide ante*, B 6.) shall be disabled in respect of him or herself only, and not of his heirs, or posterity, to inherit, purchase, take or enjoy any lands, tenements, goods, debts, legacies, &c.

And by the *st.* 3 *Jac.* 5. a child going, or sent without licence, &c. (*vide ante*, B 6.) shall take no benefit by any gift, conveyance, descent, devise, &c. of any lands, &c. leases, goods, till he, being of eighteen years of age, take the oath 3 *Jac.* 4. before a justice of peace. And in the mean time the next of kin, who shall be no recusant, shall have the said lands, &c. goods, &c. But upon conformity, by taking the oaths and sacraments, shall account for the profits, &c. and restore the goods, &c. to him or her so conforming.

By the *st.* 3 *Car.* 1. 2. any who shall go or send, &c. (*vide ante*, B 6.) being convicted on information, shall be disabled to sue, be committee of a ward, executor, or administrator; shall not be capable of any legacy, or deed of gift, or office; and shall forfeit all his goods and chattels, all his lands, tenements, rents, annuities, offices, and estates of freehold, for his life. Provided, none who conforms to the church of *England*, and receives the sacrament within six months after return, shall incur the penalties; but shall have his lands restored during his conformity.

But by the *st.* 1 *Jac.* 4. a person sent to a seminary takes the lands and the estate vested in him: for the protestant heir has only the pernaney of the profits. *Per two J. Hob.* 73. *Eq. Ca.* 34. (2d Part of 2 *Mod. Ca.*)

And such person may make a bargain and sale; and thereby take the lands out of the heir. *Hob.* 74.

So, by the *st.* 11 & 12 *W.* 3. 4. a person educated in the popish religion, or professing the same, who shall not, in six months after the age of eighteen, take the oaths, and subscribe the declaration by the *st.* 30 *Car.* 2. &c. shall, in respect of himself only, and not of his heirs or posterity, be disabled to inherit, or take by descent, devise, or limitation, in possession, reversion or remainder, any lands, &c. And during his life, till he take the oaths, and subscribe, &c. his next of kin, who is a protestant, shall enjoy the lands, &c. without account for the profits; but for wilful waste, shall answer treble damages, &c.

And from 10th *April* 1700, every papist, or person professing so to be, shall be incapable to purchase in his own name, or to his use, or in trust for him, any lands, &c. and all estates, terms, interests, or profits out of lands, made, suffered, or done to his use, or on trust mediately or immediately for his benefit, or relief, shall be void.

And this clause was confirmed by the *st.* 3 *Geo.* 18.

[Conviction

[Conviction is not necessary to prevent a papist's devising lands in Ireland; but parol evidence shall be sufficient to prove he died a papist, though he had formerly renounced and conformed. *Rice v. Oatfield*, P. & T. 11 G. 2. *Andr.* 222. 235. *Str.* 1095.]

If a papist was above eighteen years at the time of the act, yet he shall be disabled to inherit: for the statute did not intend more indulgence to persons of full age, than to infants. *Semb. Eq. Ca.* 35. (2d Part of *Mod. Ca.*)

[A papist above eighteen years and six months at making *stat.* 11 & 12 W. 3. c. 4. cannot take freehold or leasehold estate by will. *Davers v. Daves*, T. 1730, 3 P. Will. 40.]

[But he may take lands by descent, or a share of personal estate, by the statute of distributions. *Ibid.* Per King C.]

If an estate, term, &c. appears to be in trust for a papist; upon a bill exhibited by the next protestant kin, he shall have an account of the profits from the time of filing his bill. *R. Eq. Ca.* 146. (2d Part of 2 *Mod. Ca.*)

[If popish heir make a mortgage, the next protestant kin may redeem, and receive rents and profits till conformity of the heir. *Jones v. Meredith*, M. 1739, *Bunb.* 346. 2 *Eq. Abr.* 379. pl. 12. *Com.* 661. S. C.]

[A papist who has not taken the oaths, &c. (under an incapacity to hold under the statute of William) may devise lands to a protestant. *Mallom v. Bringloe*, C. P. E. 11 Geo. 2. *Willes*, 75. *Com.* 570. 2 *Eq. Abr.* 626. pl. 26. S. C.]

[He may sell to a protestant by stat. 3 Geo. 1. c. 18. s. 4. *Ibid.*]

[He may devise lands for payment of his debts to protestants. *Ibid.*]

[Also for payment of debts to papists. *Sembl. ibid.*]

[And he may by a bond charge lands, &c. *Sembl. ibid.*]

If a man devises lands to be sold for payment of debts and legacies, the residue to A. who is a papist; the devise of the residue of the money shall be considered as land, and shall be void; otherwise, by payment of the debts A. would have the land, and the statute would be eluded. *R. Eq. Ca.* 156. 170. (2d Part of 2 *Mod. Ca.*)

If a devise be of a term to a papist, the protestant next of kin shall have a decree for the term to be assigned to him, with an account of the profits from the time of his purchase. *Eq. Ca.* 146. *Ibid.*]

[If a lease for lives is made to a papist, and he commits high-treason, he forfeits nothing, for the lease was void. *R. per curiam, dissent. Foster J.* who thought he might take for the benefit of the crown: as if a villein purchase, he may take for the benefit of his lord. *Denn v. Fearnside*, M. 21 Geo. 2. 1 *Wils.* 176.]

[But if a papist, tenant in tail, conveys his estate to a protestant, to make him tenant of the freehold, till a common recovery is suffered, which is suffered accordingly, and the recovery declared to be to the use of the papist in fee, who afterwards on his marriage by lease and release conveys the same to the use of himself for life, then to his wife for life, remainder to his first and other sons in tail-male, with remainders over, and limitations to trustees to preserve contingent remainders; the recovery is good, notwithstanding 11 & 12 W. 3. the settlement good, and his eldest son shall succeed

to the remainder in tail, though the father was attainted of high-treason. *Mr. Ratcliffe's case*, H. 6 Geo. By the delegates, four against one. Str. 267.]

And by the *st.* 3 Geo. 18. no sale for a valuable consideration of any manors, lands, &c. by the reputed owner in possession, to a protestant merely for the benefit of a protestant, shall be impeached in respect of the disabilities by the *st.* 1 Jac. 4. or 11 & 12 W. 3. 4. unless the person entitled to take advantage of such disability, before such sale recovered the said manors, lands, &c. or gave notice of his claim, to the purchaser, or entered his claim at the general sessions of the county, &c. where the lands, &c. lie, before the contract for such sale, and *bonâ fide* pursued his remedy for them. *Vide post.* (B 12.)

[And by *st.* 18 G. 3. c. 60. so much of 11 & 12 W. 3. c. 4. "as relates to the apprehending or prosecuting of popish bishops, priests, or jesuits, or that subjects them, or papists keeping school, or educating or boarding youth in the realm, to perpetual imprisonment, or that disables papists to inherit or take by devise or limitation, any estate, &c. and gives the same to the next of kin, being a protestant, and so much of the same act as disables papists to purchase, &c. and makes void all estates, &c." is repealed.]

(B 8.) *Or to present to a benefice.*] By the *st.* 3 Jac. 4. s. 8. the king, &c. may refuse 20*l.* per month, and seize two parts in three of all the lands, tenements, and hereditaments, of a person not coming to church, &c.; by virtue of which seizure, if the king seizes two parts of a manor to which an advowson is appendant, the king shall have two turns of the advowson, and shall present to it alone.

So, if an advowson be in *gross*, the king may seize it, as two parts of lands, tenements, and hereditaments: for an advowson is an hereditament.

By the *st.* 3 Jac. 5. every popish recusant convict, while a recusant, and by the *st.* 1 W. & M. 26. every one recorded for refusing to sign the declaration 1 W. & M. 15. or for refusing the oaths, or seized or possessed in trust for him, and by the *st.* 12 Ann. 2 sess. 14. every papist, or person professing the popish religion, or child of such, under age, or any mortgagee, trustee, or person any ways intrusted for such directly, or indirectly, mediately, or immediately, though declared in writing, or not, shall be disabled to present or nominate to any benefice, prebend, or ecclesiastical living, school, hospital, or donative, or to grant any avoidance of them; but the presentation in twenty-six counties shall belong to the chancellor and scholars of Oxford, and in twenty-seven counties to the chancellor and scholars of Cambridge university.

Provided, their presentation to a benefice with cure, to any who hath a benefice, &c. with cure, or shall be non-resident sixty days, shall be void. By the *st.* 3 Jac. 5. and 1 W. & M. 26.

And by the *st.* 1 W. & M. 26. s. 4. if a trustee presents, &c. without giving notice of the avoidance to the vice-chancellor in three months after in writing, he forfeits 500*l.* to the chancellor and scholars.

By the *st.* 12 Ann. 14. the ordinary may tender the declaration 25 Car. 2. 2. to any person presenting, or, if absent, summon him, and

and tender it, and is required to examine on oath the person presented if his patron be not, to his knowledge or belief, a papist, or any ways trusted, &c. for such; and if the presenter refuse the declaration, or to appear, or the presented refuse to answer directly what he knows, hath heard, or believes touching the same, the presentation shall be void.

And the university may exhibit a bill to discover a secret trust, &c. or if a *quare impedit* be depending, at the request of the chancellor and scholars, being plaintiffs or defendants, the court may examine on oath, or by *affidavit*, or commission, the patron, and clerk, &c. and may enforce the producing of deeds relating to such secret trust. *By the same stat. s. 4.*

And the university may sue a *quare impedit* by the name of *chancellor and scholars*, or by their corporate name, at their election. *By the same stat. s. 9.*

[The court may direct commission under this statute to the prothonotaries, or commissioners names to be struck by them, and interrogatories to be settled by them; or may refuse to grant commission, if defendant will not agree to plead the popery acts only. *Barnes, 2. 2. 350.*]

By the *stat. 11 Geo. 2. 17.* after 6th May 1738, every grant, or devise, by a papist, or trustee, of any advowson, school, hospital, or donative, or of any avoidance, shall be void, unless made *bonâ fide* for a full and valuable consideration to a protestant, for his own benefit only.

And a mortgagee, grantee, or devisee, &c. may be examined as by the *stat. 12 Ann. 14.* though no trust in writing. *By the same statute.*

(B 9.) *To what cases the disability does not extend.*] But a limitation to *A.* who is a papist, for life, remainder to his first and other sons in tail, remainder to *B.* who is a protestant; the remainder shall be good.

And *A.* takes an estate, which supports the remainder: for the estate limited to him is not void entirely, though the next of kin, being a protestant, may take the profits. *R. Eq. Ca. 34. (2d Part of 2 Mod. Ca.)*

So, an heir, though a papist, shall take by descent; but the next protestant of kin may take the profits. *Eq. Ca. 34. Ibid.*

So, he shall sue in equity to defeat a fraudulent conveyance by his ancestor. *Eq. Ca. 34. Ibid.*

So, though by the *stat. 11 & 12 W. 3. 4.* in the second clause, no papist shall purchase, &c. but all such estates shall be void; and therefore, a devise to him, being a purchase, is void; yet if a devise be to *A.* under eighteen, educated as a papist, who in six months after eighteen conforms, &c. *A.* shall take, and the inheritance vests in him in the meantime. *R. Eq. Ca. 156. 180. Ibid.*

So, if an estate by devise be disposed to an heir at law in a particular manner, it is not a purchase by him, and void; for it comes to him in lieu of an estate which otherwise would have descended. *Eq. Ca. 170. Ibid.*

So, if a papist tenant in tail suffers a recovery, and declares the use to himself and his heirs; it is not a purchase within the *stat. 11 &*

12 *W.* 3. 4. But a new modification of his former estate. *R. Eq. Ca.* 173. (2d Part of 2 *Mod. Ca.*)

[A recovery suffered by a papist, and instructed in a seminary or college of jesuits beyond sea in the popish religion, was holden good. *Thornby v. Fleetwood*, *C. P. T.* 9 *Ann. Com.* 207. 10 *Mod.* 113. 356. 406. 11 *Mod.* 355. 1 *Str.* 318. 2 *Brown's P. C.* 203. *S. C.*]

So, a papist may be tenant by the curtesy, or in dower; for such tenant is not a purchaser. *Eq. Ca.* 173. (2d Part of 2 *Mod. Ca.*)

So, if a papist levies a fine to bar the right of another, he is not thereby a purchaser. *Eq. Ca.* 175. *Ibid.*

Or settles his estate with a power of revocation, and afterwards revokes. *Eq. Ca.* 175. *Ibid.*

So, by the *st.* 11 *Geo.* 2. 17. papists conforming, taking the oaths, &c. and subscribing the declaration, 30 *Car.* 2. and protestants claiming under them, shall be freed from the same disabilities, unless the next of kin shall have recovered by judgment or decree six months before, or unless he return to the popish religion.

[If there is a devise of lands to trustees to the use of the second son of *A.*, (which second son is a papist,) remainder to the third, &c. sons of *A.*, one of whom is not a papist, remainder to the sisters of testator, and if *A.* is still living, the sisters are not entitled to the legal estate, nor can maintain ejectment. *Marwood v. Darrel*, *H.* 8 *G.* 2. *B. R. H.* 91.]

(B 10.) By registering the Estate.

So, by the *st.* 1 *Geo.* 55. a papist, not taking the oaths and subscribing the declaration 30 *Car.* 2. in six months after full age, and having an estate in lands, &c. shall register such estate and interest, &c. in six months after the time for taking the oaths, and his name, and at what rent let, or fine paid, and in what place they lie, and in whose possession, &c. in a book kept by the clerk of the peace, in the county where the lands lie; or in default, &c. shall forfeit the fee of such lands, &c. not registred; if he, or any in trust, have the fee; otherwise, the value of the inheritance.

And the owner's name shall be subscribed to such register, in the presence of two justices of the peace.

And persons beyond sea shall have twelve months longer time.

By the *st.* 3 *Geo.* 18. the time of registering is enlarged till the 20th of *October* 1717, and by the *st.* 3. 6. 9. and 11 *Geo.* 2. 11. till the 29th of *September* 1738. By the *st.* 12 *Geo.* 2. 18. enlarged till the 28th of *November* 1739.

And if a manor lie in two counties, the register shall be in the county where the manor house is.

(B 11.) By Sale, &c. not inrolled.

By the *stat.* 3 *Geo.* 18. no manors, lands, &c. or interest therein, or rent, &c. out of them, shall pass from papists, &c. by deed, unless inrolled in the king's court of record at *Westminster*, or in the county where the lands lie, &c. in six months after the date; or by will, unless inrolled in six months after the death of the testator.

But by the *st.* 10 *Geo.* 4. it is sufficient, if a deed or will made after the 29th of *September* 1717, be inrolled on or before the 29th of

of September 1724, or by the *st.* 3 *Geo.* 2. 29. before the 29th of September 1731, or by the *st.* 8 *Geo.* 2. 25. before the 29th of September 1735. [Further time is given for the inrolment of their deeds and wills, and for the relief of protestant purchasers, by *st.* 12 *Geo.* 3. c. 10. 14 *Geo.* 3. c. 37. 17 *Geo.* 3. c. 45. 18 *Geo.* 3. c. 46.]

(B 12.) *When default of registering does not prejudice.*] But by the *st.* 1 *Geo.* 55. a purchaser *bonâ fide* for a just and valuable consideration, before conviction, or ejectment brought for the forfeiture, and not knowing of the default in registering, shall not be prejudiced by it.

So, by the *stat.* 3 *Geo.* 18. no sale for a full and valuable consideration, by a papist the reputed owner, or in receipt of the rents, &c. of any lands, &c. or interest out of them, to a protestant, for the benefit of a protestant, shall be avoided on pretence of the disability of him, or any under whom he claims, unless the person taking advantage of such disability have recovered before sale, or given notice of his claim to the purchaser; or, before the contract for the sale, shall have entred his claim in open court at the quarter sessions of the peace for the county, and *bonâ fide* pursued his remedy. *Vide ante*, (B 7.)

So, by the *st.* 6 *Geo.* 2. 5. no such sale shall be avoided by reason the deed, or will, through which the title was derived, shall be avoided, so as no advantage hath been taken for want of inrolment before the purchase made, and so as the purchaser had no notice before his purchase, that the maker of the deed or will was a papist, and no judgment, or decree, hath been had for want of inrolment.

Vide Justices of Peace, (B 14.)

P O R T.

Vide Navigation (E).

Cinque Ports.

Vide Abatement, (D 3. 5.)—*Franchises*, (E 1, &c.)

P O R T A G E.

Vide London, (K 2.)

P O R T I O N.

Vide Chancery, (2 M 10.—3 Z 1, &c.—4 W 24.)

P O R T M O T E C O U R T.

Vide Courts (I).

P O S S E C O M I T A T U S.

Vide Viscount, (C 2.)

POSSESSION.

Vide Chancery, (D 12.)—Discent, (C 9, 10.)—Execution, (A 5.)—
 Pleader, (C 39.—3 M 9. 17. 39.)—Prerogative, (D 63.)—
 Trespass, (B 2, 3, 4.)

POSSIBILITY.

Vide Assignment, (C 3.)—Grant (D).

POST-DISSEISIN.

Vide Assise, (F 1, &c.)

POSTEA.

Vide Pleader (T).

POUND.

Vide Distress.

Pound-Breach.

Vide Distress, (D 2.)

POUNDAGE.

Vide Parliament, (H 12.)—Trade, (C 1, &c.)

POWER.

Vide Poar.

PRAYER.

Aide Prier.

Vide Abatement, (I 29.)—Aide, (B 1, &c.)

Common Prayer.

Vide Parson (C).—Sacraments.

Prece Partium.

Vide Abatement, (I 21.)

PRÆCIPE IN CAPITE.

Vide Droit, (C 1.)

PRÆCIPE QUOD REDDAT.

Vide Recovery, (B 3, 4.)

PRÆMIUM PUDORIS.

Vide Chancery, (4 D 21.)

P R Æ M U N I R E.

(A) The Penalty of *Præmunire*.

A *Præmunire* (so called from the words of the writ *quod præmunire facias* A. &c.) imports an offence, by which a man incurs the penalty of the *ſt.* 16 R. 2. 5. viz. to be out of the king's protection, to be attached in his body, to lose his lands and tenements, goods and chattels. *Co. L.* 129. *b.*

And therefore, by a judgment in *præmunire*, the defendant shall be out of the king's protection, and imprisoned during the king's pleasure. *Co. L.* 130. *a.*

So, he shall lose all his goods and chattels, and his lands and tenements in fee. *Ibid.*

So, his lands in tail, &c. for his life. *Co. L.* 130. *a.*

And being out of the king's protection, in an action by him, the tenant or defendant may shew the whole record, and demand judgment, whether he shall be answered. *Lit. f.* 199.

So, by the common law, being as an enemy to the king, it was not murder, or any offence, if a man killed him. *Co. Lit.* 130. *a.*— But now by the *ſt.* 5 *El.* 1. it is unlawful to kill him.

(B) What Offences are within the Penalty.

BY the *ſt.* 35 *Ed.* 1. *De Asport. Relig.* 2, 3. no abbot, &c. shall cause to be carried out of the king's dominion any tax imposed on religious houses, under the name of rent, &c. or any goods of their houses, &c. nor shall any abbot, &c. being an alien, assess any tallage, payment, or other burden on houses in subjection to them, on pain of all that they have, or may forfeit. - And this is confirmed by the *ſt.* 3 R. 2, 3. and contains in effect the penalty of a *præmunire*. *2 Inst.* 587.

And it seems, that an offender against the *ſt.* 25 *Ed.* 3. 22. against provisors, is subject to the same penalty.

So, by the *ſt.* 27 *Ed.* 3. 1. all who draw any out of the realm in a plea, which pertains to the king's courts, or wherein judgment hath been there given; or sue in any other court to impeach a judgment in the king's court, &c. shall be out of the king's protection, forfeit their lands, goods, and chattels, and their bodies shall be imprisoned, and ransomed at the king's will.

So, if he sues in another court after judgment, whereby the cause is drawn *ad aliud examen*, though it be within the realm; as, if he sues in *Chancery*, to defeat a judgment at common law. *3 Inst.* 120. 123.

Or, before the president and council of *Wales*, commissioners of sewers, &c. *3 Inst.* 124, 125.

So, if he sues in the Ecclesiastical Court, Admiralty, &c. for a cause out of their jurisdiction. *Per Fineux*, 15 *H.* 7. 9. *R.* 12 *Co.* 39, 40. *3 Inst.* 121, 122.

So, by the *ſt.* 16 R. 2. 5. if any purchase from *Rome*, &c. a translation to a benefice, process to stay execution of a judgment in the king's court, sentence of excommunication, bulls, &c. *Dav.* 84, &c.

By the *ſt.* 2 *H.* 4. 4. if any purchase a bull to be discharged of tithes.

By

By the *st.* 1 & 2 *Ph. & M.* 8. if any molest any abbey-lands, &c.

By the *st.* 1 *El.* 1. the second offence, and by *st.* 5 *El.* 1. the first offence, if any by writing, teaching, &c. advisedly maintain the authority of the bishop of *Rome* within this realm.

Or, refuse the oath of supremacy prescribed by the *st.* 1 *El.* 1.

So, by the *st.* 13 *El.* 2. if any abet, &c. a publisher or receiver of bulls, &c. or bring in, or receive to wear, &c. an *Agnus Dei*, &c. or if a justice of peace, on discovery to him, reveals it not to the privy council in fourteen days.

So, by the *st.* 27 *El.* 2. if any send relief to a jesuit, &c. beyond sea.

By the *st.* 3 *Jac.* 4. if any, being not noble, and above eighteen, refuse the oath of allegiance, when tendered by the bishop, or the justices of the peace at quarter-sessions. 1 *Bul.* 197.

[By *stat.* 6 *Geo.* c. 18. called the *bubble-act*, projectors of unlawful undertakings: but the court has a power to moderate. *Rex v. Caymood*, *M.* 8 *G. Str.* 472. 2 *Ld. Raym.* 1361.]

(C) What Process against the Offender.

BY the *st.* 16 *R.* 2. 5. process shall be made against the offender by *præmunire facias*, in manner as is ordained in other statutes of provisors.

And by the *st.* 27 *Ed.* 3. 1. it was enacted, that there shall be a writ to take the body and seize the lands and goods into the king's hands; and if returned *non est invent.*, he shall be put in *exigend.* and outlawed; but before outlawry, he shall be received to answer, if he yield himself to prison.

But an indictment for a *præmunire*, upon the *st.* 1 *El.* & 13 *El.* ought to say, *that the defendant on purpose, and set intent to extol the authority of the see of Rome, &c.* *R. Dy.* 363. a.

PRÆROGATIVE.

(A) The King's Prerogative.

THE king's prerogative comprehends all the liberties, privileges, powers and royalties allowed by the law to the crown of *England*. *Co. L.* 90. b. *St. Præ.* 5. *Vide Roy*, (A 1, 2.)

For the king has not any prerogative, but such as the law allows. 12 *Co.* 76. 2 *Inst.* 496. 63. [*Moor*, 672. *Show. P. C.* 75. 4 *T. R.* 410.]

And by the *st.* of *Marlb.* 52 *H.* 3. 5. and other confirmations of *magna charta*, it was enacted, *quod magna charta teneatur tam in his, quæ ad regem pertinent, quam ad alios.*

And therefore no prerogative of the king can be claimed, contrary to *magna charta*. 2 *Inst.* 36.

[The care and approbation of marriages in the royal family do belong of right to his majesty, as king of this realm. *By all the judges of England, on a question proposed by the king.* *H.* 4 *G.*]

[The education and care of the persons of the royal family, the ordering the place of their abode, and appointing their governors and governesses,

gouverneſſes, and other inſtructors, attendants, and ſervants, do belong of right to his majeſty, as king of this realm. *By ten Judges : againſt Price Baron, and Eyre Juſtice. Fort.*

[*N. B.* The queſtion here was as to the king's grandchildren, but the arguments of the judges went to all perſons of the royal family.]

[By ſt. 12 G. 3. c. 11. marriages of deſcendants of *George 2d*, (except iſſue of princeſſes married into foreign families,) without the king's conſent, are void; unleſs, on twelve calendar months notice to privy council, both houſes of parliament do not declare their diſapprobation. *Vide Baron and Feme, (B 1.)*]

(B) Prerogative as to Foreign Nations.

(B 1.) Sovereignty of the Sea.

ALL the king's prerogatives relate to foreign ſtates, or to his own ſubjects. The king and his progenitors have at all times been lords of the ſea. 2 *Rol.* 168. l. 45. *Vide Navigation.*

And therefore the dominion of the whole ſea which ſurrounds *England* belongs to the king. 1 *Rol.* 528. l. 15.

And this dominion extends to both ſhores of the ſea. 2 *Rol.* 168. l. 45.

And the ligeance or dominion of the ſea belongs to the king, as to his crown of *England*. 2 *Rol.* 170. l. 42.

And therefore the king gives licence to the men of *Zealand*, &c. to fiſh in his ſea. 2 *Rol.* 170. l. 30.

To whom the property and ſoil of the ſea belongs, *vide Navigation (A—B)*.—To whom, the fiſhery, *vide poſt. (D 50.)*

(B 2.) Treaties.

The king has authority to ſend ambaffadors, envoys, &c. to foreign ſtates. *Vide Ambaffador (A)*.

(B 3.) Alliances.

To make leagues and alliances belongs to the king only. 7 *Co.* 25. b.

So, by articles of alliance, the private property or right of a ſubject may be bound; as, if *A.* bound to *B.* a ſubject of *England*, during a war between this kingdom and *Denmark*, pays the debt to the king of *Denmark*, by order of the ſtate there, and by the articles of peace, all monies paid by the ſubject of the one prince, ſhall be quit by monies paid by the ſubjects of the other, and the parties that paid to either of the king's orders, ſhall be diſcharged againſt the creditor; if *B.* ſues for ſuch debt, *A.* ſhall have relief in equity. *R.* 1 *Ca. Ch.* 123. 173.

All leagues ought to be upon record inrolled in *Chancery*, whereby every one may know who are in amity or enmity with the king, and who not. 4 *Inſt.* 152. 9 *Co.* 31. a.

By the ſt. 2 *H.* 5. 6. killing or robbing any, comprized in a truce or ſafe-conduct, was made high treaſon. But this was repealed by the ſt. 20 *H.* 6. 11. and afterwards all treaſons, not within the ſt. 25 *Ed.* 3. were ouſted by the ſt. 1 *Ed.* 6. 12. and 1 *Mar.* and all offences againſt a truce, and the king's ſafe-conduct, and now puniſhable

misshable by the *ff.* 2 *H.* 5. 6. or by the admiral. *Vide post.* (B 5.)—*Admiralty*, (E 8.)

All offences, contrary to amity or league, are to the great slander of the king, and damage of the whole kingdom. 2 *Rol.* 174. l. 45.

A league may be broken by levying war, or by ambassador or herald. 4 *Inst.* 152.

So, by a prohibition of all the commodities of the kingdom in amity. 2 *Rol.* 174. l. 5.

(B 4.) Reprisals; when granted.

So, if a foreign prince, or state, seises, or spoils the goods of subjects of *England*, the king may make reprisal upon the goods of the other's subjects in this realm. 2 *Rol.* 114.

So, if a subject of a foreign prince or state takes or spoils the goods of a subject of *England*, and his sovereign, upon a letter of request to him by the king, refuses to do right, the king may, by his writ, arrest the body or goods of him who did wrong. 2 *Rol.* 175. l. 5. 4 *Inst.* 137. *Reg.* 129.

And if he who did the wrong is not found, or has no goods, &c. he may arrest the goods of other subjects of the same prince, within this realm. 2 *Rol.* 175. l. 10.

Or, the king may enable him, to whom the wrong was done, by letters of *marque*, the goods of other subjects of the same state, *mercere retinere & appropriare, quosque restitutio facta sit.* 2 *Rol.* 175. l. 20. *Per Coke*, 1 *Rol.* 175.

But a subject of the king cannot take the goods of the subjects of a prince in amity with the king, by force of letters of *marque* of another sovereign, or state. *R.* 2 *Vern.* 592.

So, by the *ff.* 4 *H.* 5. 7. if any attempt be made by the king's enemies on the liege people against the tenor of a truce, wherein is not express mention, that letters of *marque* and reprisal shall cease, the king shall grant letters of *marque* to the parties grieved, who may complain to the keeper of the privy seal, and he, on the complaint, shall make him letters of request, if desired, under the privy seal; and if, after request, satisfaction is not made, the chancellor, on demand, shall make him letters of *marque* under the great seal.

So, the king may repeal such letters of reprisal after peace established. 1 *Ver.* 54.

So, after a truce, or safe-conduct. 1 *Ver.* 54, 5.

Though there be a clause inserted, that they shall not be void upon a peace. 1 *Ver.* 54.

[By 13 *G.* 2. c. 4. the officers, seamen, and soldiers in a man of war, have the property of all prizes, in such proportion as the king shall direct by proclamation; and privateers, according to their agreement, without any deduction to the king, admiral, or others.]

[And by *ff.* 15. five pounds shall be paid by the treasurer of the navy for every man on board an enemy's ship of war or privateer, taken or destroyed, at the beginning of the engagement. And by *stat.* 17 *Geo.* 2. c. 34. *ff.* 19.]

[By *ff.* 18. if a *British* ship is retaken, it shall be restored on paying for salvage one eighth of the value to a man of war; and to a privateer, if retaken in twenty-four hours, an eighth; in forty-eight hours, a fifth; in ninety-six, a third; and above ninety-six hours, an half.]

[By

[By *stat. 17 Geo. 2. c. 34.* ships of war have the sole property of prizes.]

[By *ff. 2. & seq.* commissioners of Admiralty to give commissions to privateers; and the method of proceeding on prizes are regulated.]

[If a prize be taken, by two or more privateers, they are to share proportionably according to the number of men of which their respective crews consist. *Doug. 311.*]

[By *ff. 16.* the king may grant charters of goods and lands to be taken from an enemy by private adventurers.]

[By *ff. 20.* *English* ships retaken from the enemy shall be restored to the owners, paying one eighth of the value for salvage to a man of war; but to a privateer, if retaken in twenty-four hours, one eighth; if in forty-eight hours, one fifth; if in ninety-six hours, one third; if above one half, and if converted into ship of war by the enemy, one half.]

[*Stat. 29 G. 2. c. 34.* regulates the distribution of prizes, and *32 G. 2. c. 25.* explains and amends it.]

[*Stat. 18 G. 3. c. 15.* contains regulations concerning prize-goods not the produce of *North America.*]

[*Stat. 19 G. 3. c. 67.* orders that prizes shall be distributed in the manner pointed out by his majesty's proclamation, during the war with *France*, under that act and proclamation; a captain of marines who happens to be on board a man of war, when she takes a prize, but does not belong to her compliment, shares only as a passenger. *Doug. 324.*]

[The captain of a ship actually on board at the time of a capture is entitled to prize-money, though under arrest at the time, and though another officer had been sent on board to command the ship. *Lumley v. Sutton, B. R. E. 39 Geo. 3. 8 T. R. 224.*]

[During the late war a flag-officer on a certain station gave orders to a ship under his command to sail on a cruize; after the orders were given, but before a prize was taken, he accepted another command; but no other flag officer was appointed to succeed him on the former station. He was not entitled to one eighth of a prize taken by the ship which sailed in consequence of his orders, under the proclamation for the distribution of prizes. *Johnstone v. Margetson, C. P. T. 29 Geo. 3. 1 H. Bl. 261.*]

(B 5.) Safe-conduct.

The king only can make letters of safe-conduct. *7 Co. 25. b.*

By which he takes the party into his keeping and protection. *Vide Reg. Or. 25. b.*

And these letters of safe-conduct ought to be inrolled upon record in *Chancery*. *4 Inst. 152.*—By the *ff. 20 H. 6. 1.* They are otherwise void.

And by the *ff. 15 H. 6. 3.* they shall express the name of the ship, master, number of mariners, with the portage of the ship.

And by the *ff. 18 H. 6. 8.* merchants may take ships of enemies, not having the letters patent of safe-conduct on board, or inrolled in *Chancery*. *Conf. by the ff. 20 H. 6. 1. f. 3, 4. and 14 Ed. 4. 4.*

No subject of a king, in enmity with the king of *England*, can come into the kingdom, without the king's licence and safe-conduct.

So, a sovereign of another kingdom cannot come hither without the king's licence, though he be in amity; as the king of the *Isle of Man*, before its subjection to the kingdom of *England*. 7 Co. 21. b. Calvin.

So, of antient time, an ambaffador, who was *prorex*, could not come without a safe-conduct. 4 Inst. 155.

But a subject of a king in amity may come without licence, or safe-conduct. 7 Co. 21. b. Calvin.

By the *ft.* 31 H. 6. 4. if a subject attaches the person or goods of any one who comes by way of amity, truce, or safe-conduct, the chancellor, calling to him any justice of the one bench or the other, on a bill of complaint, may make process against the offender; and may award delivery and restitution of the person, ship, or goods. Conf. by 14 Ed. 4. 4.

How breach of safe-conduct shall be punished, *vide ante*, (B 3.) Admiralty, (E 8.)

(C) Prerogatives in respect of the King's own Subjects; in Time of War.

(C 1.) To declare War.

THE king's prerogative in respect of his subjects, relates to war or the time of peace; for the king has the sole authority to declare war, or peace. 7 Co. 25. b. *Vide ante*, (B 3.)—Parliament, (H 24.)

(C 2.) To levy Soldiers.

Antiently, every one bound by tenure to do any service to the king in his wars, ought to serve according to his tenure.

And in the time H. 6. and since, it was usual for any knight, or other, to make a covenant with the king by indenture, inrolled in the *Exchequer*, to serve him with so many men named in a list, for so long a time in his war. Co. L. 71. a.

By the *ft.* 11 H. 7. 1 & 18. it is said, that every subject, by the duty of his allegiance, is bound to serve and assist his prince in his wars, &c.

But a man is not bound to serve the king out of the realm, except for wages. 1 Roll. 166. l. 10 ad 30.

Nor can he be sent by the king out of the realm to serve there. 2 Inst. 47.

Though he be sent only to *Ireland*. *Ibid.*

Or be sent to be in an office, as deputy, captain, ambaffador, &c. *Ibid.*

[The right of impressing *mariners* for the sea-service, whenever the public safety requires it, is a prerogative inherent in the crown, grounded on the common law, and recognized by many acts of parliament. *Foster*, 154.]

[But this power must not be wantonly exercised by the officer employed in the impress service; an information was granted against one *Webb* for having impressed captain *Wager* of a merchant ship to serve as a common seaman. 1 Bl. Rep. 19.]

[And

[And there are certain exemptions—Thus; the better opinion seems to be, that a bargeman protected by the Navy Board, while carrying timber to the king's docks, cannot be impressed by virtue of any warrant from the Admiralty. 2 *Bl. Rep.* 1207.]

[The bargemen of the lord mayor of *London* are not privileged from being impressed if not employed in the act of rowing the lord mayor in his barge, though it might be an abuse of power to impress them in that situation. *Cowp.* 518.]

[Whether the possession of a landed estate to a small amount will exempt a mariner, is yet undecided. *Vide* 1 *Bl. Rep.* 251.]

[By 13 *G. 2. c. 17.* every person of fifty-five or under eighteen years, and every foreigner serving in a trading vessel or privateer, is exempted from being pressed.]

[And all persons for the first two years of their going to sea, and apprentices for the first three years.]

[And the Admiralty to grant protections accordingly, without fee.]

[By 13 *G. 2. c. 28. ff. 5.* persons employed in the *Greenland* fishery exempt from being pressed.]

[By *ff. 19 Geo. 2. c. 30.* mariners belonging to privateers or trading ships are not to be impressed in the *West Indies*, unless they shall have deserted from his majesty's ships; and the officer impressing, &c. subjected to a penalty of 50*l.* to the master or owner, to be recovered in any court of record within his majesty's dominions.]

[But in debt on this statute, the declaration must aver that the mariner had not deserted from *any* of his majesty's ships of war. 1 *Term Rep.* 141.]

[See the *stat. 22 Geo. 2. c. 33.* for the government of his majesty's ships, vessels, and forces by sea, and the case of *Sutton v. Johnston*, 1 *T. R.* 493.]

(C 3.) Command of the Forces.

The government and command of the *militia*, and all the forces by sea or by land, and of all forts belong only to the king.

And by the *ff. 13 Car. 2. 6.* it was declared, that the whole supreme government, command, and disposition of them, by the laws of *England*, ever was the undoubted right of the kings and queens of *England*; and that both or either of the houses of parliament ought not to pretend to the same.

[By the acts of mutiny and desertion, the king's power to make articles of war is confined to his own dominions; when his army is out of his dominions, he acts by virtue of his prerogative, and without the statute or articles; therefore the courts here have no jurisdiction for a wrong done by an officer to a soldier there (as, for degrading him from being serjeant to a common soldier). *Barwis v. Keppel*, 1 *G. 3. 2 Wilf.* 314. *Vide ff. 26 G. 3. c. 107.* the new militia act. As to billeting soldiers, *vide* 1 *Bl. Rep.* 350. *Vide* 2 *Burr.* 1149. 3 *Term Rep.* 133. 37 *Geo. 3. c. 33. f. 31.*]

[The foot-guards may be billeted all over the kingdom as well as the other troops. *Rex v. Calvart*, 1 *T. R.* 724.]

(C 4.) Building of Forts, &c.

So, the king by his prerogative has the sole power of building castles, forts, &c.

And a subject cannot build a castle, an house with battlements, or any fortrefs, without the king's licence. *Co. Lit.* 5. a.

Vide War.

(D) Prerogatives, which regard Time of Peace.

(D 1.) Enacting of Laws.

THE king's prerogatives, which concern times of peace, relate, 1. To the enacting of laws. 2. Jurisdiction. 3. The nomination of officers. 4. Trade. 5. The revenue.

And therefore, no statute can be enacted without the royal assent. *Vide Parliament*, (G 10. 21.—R 3, &c.)

But the king cannot alter the course of descent by his grant; as he cannot by his charter make land to be partible among all the children, which before descended to one. *2 Rol.* 164. l. 5.

Nor, grant that land shall be devisable. *2 Rol.* 164. l. 7.

That a man shall hold his land, after his profession in religion. *2 Rol.* 164. l. 10.

So, the king cannot by his grant alter the law in any respect; as, he cannot give power to any to oust another of his land. *2 Rol.* 164. l. ult.

(D 2.) *Proclamations. When he may issue them.*] So, the king by his proclamation may enforce the execution of laws.

And therefore if the king by proclamation prohibits that which was before unlawful, the offence afterwards will be thereby aggravated. *12 Co.* 75.

So, the king by his proclamation may admonish his subjects, that they do not offend, under the penalty of the law. *12 Co.* 76.

So, by the *st.* 1 *Jac.* 25. the king may by proclamation restrain the transportation of any grain, generally, or from any particular ports.

And by the *st.* 12 *Car.* 2. 4. *st.* 12. the transportation of gunpowder, arms, or ammunition.

By the *st.* 31 *H.* 8. 8. the king, with the assent of the greater part of the privy council, might issue a proclamation, which should be obeyed as an act of parliament, and the offender to pay such forfeitures, and suffer such imprisonment as mentioned in the proclamation. But this is now repealed by the *st.* 1 *Ed.* 6. 12.

(D 3.) *When not.*] But the king cannot, by his proclamation, make a thing unlawful, which was before lawful; for the king cannot create an offence, by proclamation. *12 Co.* 75.

And therefore nothing will be punishable after a proclamation, which was not so before. *Ibid.*

So, he cannot by proclamation alter any part of the common law, statutes, or customs of the realm. *Ibid.*

And therefore a proclamation for the suspension of the execution of a statute, till the next parliament, is illegal and void. *Ibid.*

A pro-

A proclamation that none import wines of such a country, which is in amity, under the pain of forfeiture, will be void. *2 Inst.* 63.

A proclamation that if the buyer of an horse in a fair or market, or out of a fair or market, in the county of *N.* do not pay toll, his horse shall be forfeited, is void. *Sembl. but not determined. 2 Rol.* 172.

So, none can make proclamation, but by the authority of the king, or lawful custom; for it is the prerogative of the king to issue proclamations. *12 Co.* 75.

So, every proclamation ought to be *sub magno sigillo Angliae.* *Cro. Car.* 180.

And it is most proper and safe to be so pleaded. *R. Cro. Car.* 180.

(D 4.) *Dispensation. The nature and effect of it.*] A dispensation makes an act, otherwise prohibited, lawful to him to whom the dispensation is granted; for *dat jus.* *Vau.* 333.

And this prerogative belongs to the king by the common law, in a case of necessity. *Hard.* 446. 448.

But dispensations are odious in law. *2 Rol.* (179.) l. 25.

(D 5.) *How it shall be made.*] In a dispensation, the word *dispense* is not necessary; and therefore a dispensation to hold a plurality by the words, *unimus incorporamus*, &c. is sufficient. *R. Cro. Eliz.* 720.

(D 6.) *In what cases the king may make a dispensation.*] If an act of parliament regards only the king's benefit, he, by his prerogative, may grant a dispensation of the statute. *2 Rol.* 179. l. 47.

In which case the king, in respect of place, time or person, dispenses with a particular person, that he shall not incur the penalty of the statute. *7 Co.* 36. b.

As, if a statute prohibits a thing only *sub modo*, or under penalty. *Semb. Hard.* 110.

So, where a statute limits a time for advancement of justice, the king may enlarge it; as, where the *st. W.* 2. 10. provides, that in the *eyre*, proclamation be made for delivery of writs within fifteen days, or a month, the king may enlarge the time by his dispensation. *2 Inst.* 377.

So, if a prohibition by a statute be general, yet, in respect of the inconvenience to particular persons, though a remedy be given for the penalty to the king alone, or by action popular, the king may dispense with the particular persons. *2 Rol.* 179. l. 35.

As, if the king lets lands to the vicar of *W.* in farm, to the intent that he maintain hospitality, *non obstante* any statute. *Semb. Sav.* 22.

(D 7.) *In what not.*] But the king cannot dispense with a thing, being *malum in se.* *Hard.* 448.

As, that a simoniac may take a benefice. *Hard.* 445. *3 Inst.* 154.

Nor, with a thing, which would be a nuisance. *Hard.* 444, 5.

So, the king cannot dispense with a thing, against which the subject may defend himself by law.

So, the king cannot dispense with any thing, in which the subject has an interest. *Hard.* 449.

And therefore he cannot change or dispense with the common law, by his charter; as, if he grants that an alien shall inherit, it will be void. 2 *Rol.* 115.

That land of the nature of *gavelkind* shall descend to the eldest son. 2 *Roll.* 115.

So, the king cannot dispense with *magna charta*, which is incorporated into the common law. *Ibid.*

Nor, with the *ft.* 13 & 15 *R.* 2. 3 & 5. or 2 *H.* 4. 11. which restrain the incroachments of the Admiralty. 4 *Inst.* 135. 137. *Vide infra.*

Nor, with a statute for the benefit of the church, or the public good; for every subject has an interest in it. As the *ft.* 5 & 6 *Ed.* 6. against the sale of offices. 3 *Inst.* 154.

Or, the statute which requires the oaths of allegiance and supremacy. *Ibid.*

So, the king cannot dispense with an act of parliament, by which the subject has benefit. 2 *Rol.* (179.) l. 50.

As, if a statute prohibits a foreign manufacture *pro bono publico*, to the intent that the people here may make the manufacture, the king cannot dispense with it. 2 *Rol.* (179.) l. 40. *R.* 11 *Co.* 88.

The *ft.* 15 *R.* 2. provides that the admiral shall not hold plea except of a thing done *super altum mare*; the king cannot dispense that he shall hold plea *a primis pontibus usque ad mare*; for the statute was made for the public good. 2 *Rol.* (179.) l. ult.

So, the king cannot dispense with the *ft.* 27 *Ed.* 3. that merchants aliens, but not denizens, might export merchandize of the *staple*. 2 *Rol.* (180.) l. 5.

Nor, with the *ft.* 5 *El.* 4. that the indenture of apprenticeship of a mariner shall be inrolled in the next town-corporate, to make it to be inrolled in the corporation of *Trinity-house*. *R.* 3 *Lev.* 389.

Nor, with the statute against recusants. *R.* *Hard.* 110.

Though the remedy be given to the king for the benefit of the subject.

[By 1 *W. & M.* *ft.* 2. c. 2. s. 12. a dispensation by *non obstante* to any statute shall be void, except a dispensation be allowed of in such statute.]

(D 8.) *Pardon.*] So, the king may pardon all offences, of which a man is attainted, or convicted. *Vide Pardon* (A).

So, all offences within the jurisdiction of the spiritual court.

So, if a man be excommunicated for a contempt, and the king grants a general pardon, whereby the contempt will be pardoned, the excommunication is avoided: and if he be taken upon an *excommunicato capiendo*, he shall be discharged. *R.* 2 *Rol.* (178.) l. 45. *Adm.* 2 *Lev.* 36.

But the king cannot reverse a judgment against a criminal without legal process. 2 *Rol.* 164. l. 50.

(D 9.) Prerogative as to Jurisdiction Ecclesiastical.

The king has full prerogative and jurisdiction to do justice and right to all within his kingdom, in all causes ecclesiastical, or civil. 5 *Co.* 8. b. *De Jur. Eccl.*

And

And may correct and reform all crimes, abuses, and enormities within his kingdom. 5 Co. 9. b. *De Jur. Eccl.* 2 Rol. 230. l. 5. *Vide Visitor*, (A 1.)

By the *st.* 37 H. 8. 17. the parliament recognizes that the king is supreme head on earth of the church of *England*, and hath full power and authority to punish and repress all manner of heresies, errors, vices, sins, abuses, idolatries, hypocrisies, and superstitions within the same, and to exercise all manner of ecclesiastical jurisdiction. And this was before enacted by the *st.* 26 H. 8. 1. *Vide post.* (D 17.)

But the *st.* 26 H. 8. 1. and 37 H. 8. 17. were repealed by the *st.* 1 & 2 Ph. & M. 8. and afterwards by the *st.* 1 El. 1. all statutes there mentioned are revived; among which was the said *st.* 37 H. 8. 17.

And by the *st.* 8 El. 1. it is allowed, that king *Henry VIII.* by the clergy in convocation, and by the lords spiritual and temporal and commons in parliament, was rightfully acknowledged to have the supreme power, jurisdiction, &c. over all the estate ecclesiastical, and the same did use accordingly.

And all ecclesiastical jurisdiction began originally by the grant of *W. 1.* or rather by parliament; for before, ecclesiastical causes were determined in the hundred. 2 Rol. 216. l. 20.

The jurisdiction of the bishops, &c. began by the king's grant. 2 *Rusb.* 1343.

The supreme ecclesiastical authority is inherent in the king, and a flower of his crown. *Hob.* 143. *Vide post.* (D 17.)

Wherefore he may by *mandamus* command the ecclesiastical judge to do right; as to swear a churchwarden, sexton, &c. chosen according to custom. R. 2 Rol. 234. l. 15. 35. *Vide Mandamus* (A).

To grant administration, probate of a will. 2 Rol. 234. l. 30.

So, before the *st.* 16 Car. 11. he could grant an high commission for the correction of abuses, &c. which was not founded upon the *st.* 1 El. 1. but by the antient power of the crown explained and declared by that same statute. R. 2 Cro. 37. 2 Rol. 219. l. 30. *Vide Courts*, (N 1.)

So, the king as sovereign of the realm ought to endeavour that nothing be done to the disherison of the crown, or propagation of a false religion: and therefore, he may exhibit an information for the discovery of a superstitious use. R. 1 Sal. 163. *Vide Uses* (M).

(D 10.) *Ecclesiastical laws.*] As to the usurpation of ecclesiastical jurisdiction by the pope, and how restrained, *vide Ecclesiastical Persons*, (B 1.)—*Popery.*—*What are ecclesiastical laws*, *vide Canons* (C).—*Convocation* (E)

The ecclesiastical laws, though derived from others, yet being approved and allowed here by general consent, are the king's ecclesiastical laws. 5 Co. 9. a. *De Jur. Eccl.* Dav. 70. b.

And by the *st.* 25 H. 8. 21. *England* is subject to no laws, but such as are made within the realm, or by long use, and free consent the people have bound themselves to the observance of. *Vide Canons* (C).

And therefore the ecclesiastical laws are made within the realm, or adopted by usage and custom.

Before the Conquest, the king, with the assent of the clergy, and since the Conquest, in convocation and provincial synods, have made constitutions; all which are part of the ecclesiastical laws at this day. *Dav. 72. b.*

And such constitutions, with the king's assent, are good laws for the government of the clergy, without the parliament. *R. 2 Cro. 37. R. Mo. 783.* in ecclesiastical matters.

But a bishop, or other ordinary, cannot, without a canon or custom, command a layman to observe any new rule or ceremony. *Per two J. Houghton cont. 2 Rol. 221. 2.*

(D 11.) *Are within the power of the king.*] Forasmuch as the ecclesiastical laws are the king's laws, the interpretation and execution of them belongs to the king, and his ministers. *Dav. 70. b. Vide Canons (C).*

So, the king has power to dispense with the ecclesiastical law. *R. Dav. 73. a. 70. b.*

And therefore may exempt from the visitation and jurisdiction of the ordinary. *Dav. 73. a. Vide Visitor, (A 7.)*

He might of common right, before the *st. 25 H. 8. 21.* grant a dispensation in commendam. *Dav. 73. Vide post. (D. 18, &c.)*

He might dispense with a bastard to be a priest. *Hob. 147.*

So, the king may pardon an offence contrary to a canon, or the ecclesiastical law. *Dav. 73. a.*

And such pardon shall be a bar in all suits *pro salute animæ*, or *reformatione morum*, and all suits *ex officio* in the ecclesiastical court. *Dav. 73. a. Vide Pardon, (E 1.)*

What causes belong to ecclesiastical consueance, or not, *vide Prohibition, (A 2.—F 1, &c.—G 1, &c.)*

As to the jurisdiction and proceedings in ecclesiastical courts, *vide Courts, (N 1, &c.)*

(D 12.) *Censures Ecclesiastical.*] So, the king, and commissioners appointed by him, may pronounce sentence of deprivation, or other ecclesiastical censures, pursuant to the common law used in this realm. *Semb. 2 Cro. 37. R. Mo. 755.*

And where a bishop takes caution by obligation, he ought to take it in the name of the king. *Per Wild, 2 Lev. 36.*

So, the king and his commissioners may pass a censure, pursuant to a canon, though there be a high commission for the same offence. *Poph. 59.*

But an ecclesiastical judge cannot impose a pecuniary mulct or fine for an offence. *2 Rol. 216. l. 35. Vide Poph. 60.*

(D 13.) *Appeals. In what court an appeal shall be.*] By the *st. 24 H. 8. 12.* all causes testamentary, of matrimony, divorce, tithes, &c. shall be finally determined within this realm, without appeal, &c. to the see of Rome, or other foreign court; and any who procure such appeal, &c. shall incur a *præmunire*. *Conf. by the st. 25 H. 8. 19.*

And by common law, appeals were determined within the realm, without appeal to Rome. *2 Rol. 233. l. 25—35.*

By the *st. 24 H. 8. 12.* if a cause be begun before an archdeacon or his official, the appeal shall be to the bishop of the diocese. *Vide 4 Inst. 339.* If

If commenced before the bishop diocesan, or his commissary, to the archbishop of the same province. 4 *Inst.* 339.

[An appeal lies from the ordinary about setting up ornaments in a church, and if the ordinary, as archdeacon, was also commissary to the bishop, the appeal is to the metropolitan. *Cart v. Marfb, M. 11 G. 2. Str.* 1080.]

If before the archdeacon of any archbishop, or his commissary, to the court of the arches, or audience of the same archbishop, and from that court within fifteen days after sentence there, to the archbishop of the same province.

If the king be concerned, the appeal shall be to the upper house of convocation. 4 *Inst.* 339, 340.

And by the *st.* 25 *H. 8.* 19. appeals shall be made in the same manner in all causes, of what nature soever.

An appeal from the bishop, or his commissary, to the archbishop in his court of arches, is good; though this is not the proper court; for these words, *in his court of arches*, shall be rejected as superfluous. *R. Dy.* 240. b.

So, an appeal lies from the dean or commissary of the archbishop in his exempt jurisdiction, to the court of arches or audience by the common law; for it is not within the *st.* 24 *H. 8.* 12. *Ought. Tit.* 275.

So, it lies *a delegato ad delegantem*, viz. from the commissary or official of a bishop, to the bishop himself. *Ought. Tit.* 274.

(D 14.) *To the delegates.*] By the *st.* 24 *H. 8.* 12. causes commenced before any of the archbishops of *Canterbury* or *York*, or brought before them by way of appeal, shall be finally determined by them, without other or further appeal.

But by the *st.* 25 *H. 8.* 19. for lack of justice in any of the courts of the archbishops, it shall be lawful for the parties grieved to appeal to the king in *Chancery*, and on such appeal, a commission under the great seal shall be directed to such as shall be named by the king, (as in case of appeal from the admiral's court,) to hear and definitively determine such appeal, with all circumstances concerning the same, whose sentence shall be definitive.

And by the *same statute*, appeals from the governors of abbeys, or other places exempt, shall be made to the king in *Chancery* (as before to the pope) immediately, and be by such commissioners definitively determined.

And therefore, in all ecclesiastical causes, an appeal lies to the delegates. 4 *Inst.* 339.

[It is discretionary in the court of *Chancery*, whether they will grant a full commission of delegates, (*i. e.*) to lords spiritual and temporal, judges at common law, and civilians, or to judges and civilians only. *Ex parte Hellier, P.* 1754, 3 *Atkyns*, 798.]

[Where the jurisdiction of bishops is in controversy, or a question depending which concerns the canon or ecclesiastical law, a full commission is granted; where it is a mere matter of law, as a question on a will, it issues to judges and civilians only. *Ibid.*]

[One interested in a sentence may have a commission of delegates to review, though no party to the original suit. *Jones v. Bougett, H.* 1739, 1 *Atkyns*, 298.]

The king may appoint whom he pleases to be the delegates.

And afterwards may add others by a commission of adjuncts. *Ray. 475.*

If any of the judges are in the commission, the place of assembly is usually appointed by one of them at *Serjeants'-Inn. Ray. 476.*

[On an appeal on a collateral point, the court of delegates may, instead of remitting the cause to the arches, retain it *ad instantiam partis*, and hear it on the merits. *Williams v. Osborne, Delegates, 1718, Str. 80.*]

The delegates ought to proceed according to the ecclesiastical laws, and they cannot fine or imprison. *4 Inst. 334. Conf. by st. 13 Car. 2. 12.*

They may excommunicate. *R. 2 Rol. 233. l. 10. Cont. 2 Bul. 4.*

So, if they repeal an administration granted by an inferior judge, they may grant administration. *Semb. Latch, 85. 2 Rol. 233. l. 10. Vide Administrator, (B 2.) R. cont. 2 Bul. 4.*

But an appeal does not lie to the delegates upon a sentence of deprivation by a visitor of a college; for this is a temporal matter. *4 Inst. 340. Dy. 209. a.*

Or, by visitors constituted by special commission. *4 Inst. 340. 2 Rol. 232. l. 50.*

As to an appeal to the delegates in marine cases, *vide Admiralty (G).*
To parliament, from *Chancery, vide Parliament, (L 7.)*

To a visitor, *vide Visitor.*

To the pope, *vide Popery, (A 3.—B 2.)*

(D 15.) *To the convocation.*] By the *st. 24 H. 8. 12.* in causes testamentary, or of marriage, divorce, tythes, &c. which may touch the king, the appeal shall be to the upper house of convocation of the same province. *Vide Convocation (D).*

(D 16.) *Commission for review.*] Though by the *st. 24 & 25 H. 8.* the sentence of the delegates is final, yet the king may grant a commission of review; for this is not restrained by the same acts, and the pope, as supreme head, (whose authority is now annexed to the crown by the *st. 26 H. 8. 1. and 1 El. 1.*) had power to do it. *R. 4 Inst. 341. R. Mo. 462. Cro. El. 571.*

So, though a decree by the high commission had no appeal, yet the king, by a special commission, might have examined it. *2 Rol. 233. l. 20. Adm. Mb. 782.*

But a commission of review is *ex gratia*, and not of right. *Mo. 782.*

If an appeal be just, the superior judge ought to receive it. *4 Inst. 340.*

And the king cannot take away the benefit of an appeal. *Ibid.*

An appeal lies *à sententia definitiva, vel decreto interlocutorio habente vim sententiæ definitivæ per procuratorem vivâ voce* immediately upon sentence given. *Ought. Tit. 289. 295.*

Or, within fifteen days after sentence, in writing before a notary public. *Ought. Tit. 295, 296.*

So, an appeal lies *a gravamine* before sentence; which ought to be in writing, and specify the *gravamen*. *Ought. Tit. 277. 285.*

If an appeal be lawfully made, the inferior judge cannot proceed; for his authority is suspended. *4 Inst. 340. 6 Co. 18. b.*

So, by an appeal the sentence is suspended. *2 Rol. 233. l. 40.*

If an appeal be from a sentence of excommunication, the party might

might *celebrare missam*, may sue actions, &c. pending the appeal. 2 *Rol.* 233. l. 42.

And where a sentence is afterwards revoked and annulled upon a citation, without appeal, all *mesne* acts are good. *R. 6 Co.* 18. b.

So, if the commission of an inferior judge has the words, *appellatione remota*, he may proceed to the execution of his sentence, till the appeal received, and an inhibition sent to him. 4 *Inst.* 340.

So, if, after sentence, the party be excommunicated for not performing it, and then he appeals; though the sentence be thereby suspended, the excommunication is not suspended. *R. Mo.* 850.

In an appeal from a definitive sentence (not upon a *gravamen*) each party may *non allegata allegare, et non probata probare*.

If there be an appeal to a superior judge, he ought to give the same sentence that the inferior ought; as if they repeal an administration granted by an inferior judge, the delegates may grant administration. *Latch*, 85. *Vide ante*, (D 14.)—*Administrator*, (B 2.)

So, if the superior judge revokes the former sentence, he ought to reverse all the *mesne* acts done after the appeal to the prejudice of the appellant. 4 *Inst.* 340.

(D 17.) *Supremacy in ecclesiastical affairs.*] By the *st.* 16 *R.* 2. 5. of *Premunire*, the crown of England is subject to none, but immediately unto God.

And by the *st.* 25 *H.* 8. 21. the kingdom of England recognizes no superior under God, but the king. *Vide Dav.* 61.

And this was only a declaration of the common law. *Mo.* 782.

And therefore the king of England is *supremum caput ecclesie Anglicanæ*. *Vide Ecclesiastical Persons* (A).

This title of *supreme head of the English church*, was first attributed to the king by the clergy in convocation. 20 *H.* 8. *Co. Lit.* 7. a.

And was afterwards used by the king. 22 *H.* 8. *Ibid.*

By the *st.* 26 *H.* 8. 1. the king, his heirs, and successors, shall be reputed the only supreme head on earth of the church of England, and shall have, united to the imperial crown of this realm, as well the title and style thereof, as all honours, dignities, jurisdictions, &c. to the same belonging, &c.

By the *st.* 37 *H.* 8. 17. the same title was recognized by parliament. *Vide ante*, (D 9.)

But those statutes were repealed by the *st.* 1 & 2 *Ph. & M.* 8.; yet afterwards by the *st.* 1 *El.* 1. that statute of repeal was repealed, as to all statutes by this revived, and the statute 37 *H.* 8. 17. is thereby expressly revived.

And by the *st.* 1 *El.* 1. all jurisdictions, privileges, &c. spiritual or ecclesiastical, by any spiritual or ecclesiastical power, or authority lawfully used, for the visitation of the ecclesiastical state or persons, reformation, order, or correction of the same, and of all errors, heresies, schisms, &c. shall be for ever annexed to the imperial crown of this realm.

And therefore all ecclesiastical jurisdiction, though usurped by the pope, was now restored to the crown. 4 *Inst.* 325. *Vide Ecclesiastical Persons*, (A—B 1.)

So, by the *st.* 1 *El.* 1. [the queen, by letters patent under the great seal, may authorize such persons, being natural-born subjects, whom, when,

when, and as long as she pleases, to exercise all spiritual and ecclesiastical jurisdiction within her dominions; and to visit, reform, correct, &c. all errors, heresies, schisms, abuses, &c. which, by any spiritual or ecclesiastical power, &c. may be lawfully reformed, &c.] (Repealed by 16 Car. 1. 11.) *Vide Courts*, (N. 1.)

So, ecclesiastical courts may be held in the name of the ordinary, without the king's patent. 2 *Rusb.* 451. *Cont.* 2 *Rusb.* 1344. *Acc.* 12 *Co.* 7. 2 *Rusb.* *App.* 278.

And all process may issue under the seal of the ordinary, and needs not the great seal, or other seal of the king. 2 *Rusb.* 451.

Though by the *st.* 1 *Ed.* 6. 2. it was enacted, that all process ecclesiastical shall be made in the name of the king, and have no other seal than what hath the king's arms, &c. for that statute is now repealed. *R.* 12 *Co.* 7.

(D 18.) *Dispensation in commendam.* *When a dispensation is necessary.*] By the ancient ecclesiastical law, a bishop could not have or hold a benefice with cure within his diocese; for if he had such, it became void when he was created a bishop. *Dav.* 68. *b.* *Vau.* 19, 20.

So, by acceptance of a second benefice with cure, by the common law the first became void. *Vide Esplife*, (N 5.)

And therefore, in these cases, a dispensation was necessary for retaining the first benefice.

A dispensation *in commendam* is *semestris*, *temporaria*, or *perpetua*. *Hob.* 144.

Semestris is for six months after voidance, till presentation; and therefore lawful. *Ibid.*

So, a perpetual *commendam*, or for life, to take, with the consent of the patron, may be allowed in some cases; for it is in the nature of a provision. *Hob.* 153.

Otherwise, of a temporary *commendam*. *Hob.* 153. 155.

(D 19.) *By whom it may be granted.* *When by the king.*] But the king may grant a dispensation to a bishop elect, before consecration, to retain his benefice *in commendam*, by the common law. *R.* 2 *Rol.* 233. *l.* 50. *Hob.* 143. *Dav.* 73. *Hob.* 147.

So, the king may grant all dispensations since the *st.* 25 *H.* 8. *Vide post.* (D 20.) in the same manner as before; for though the statute says, *all dispensations shall be granted in manner following, and not otherwise*, the king is not thereby restrained. *Hob.* 146.

And therefore the king now may grant a dispensation *retinere in commendam*.

And this may be for years, or *quamdiu* he is a bishop; for it continues the former incumbent for a time. *Hob.* 156.

So, it may be *tenere* a deanry, prebend, or other dignity *in commendam*. 2 *Rol.* 451.

(D 20.) *When not.* *And when a dispensation may be granted by the archbishop, or not.*] Yet a dispensation *capere in commendam* a church, then full of an incumbent, cannot be granted. *Hob.* 150.

By the *st.* 25 *H.* 8. 21. every dispensation, licence, &c. shall be granted in manner following, and not otherwise, *viz.* the archbishop of Canterbury shall have authority by instrument, under the seal of the archbishop,

archbishop, to grant all dispensations, &c. necessary for the profit of the king and his realm, so as he grant none for any cause repugnant to the law of God.

But shall grant none but in cases accustomed to have such by the authority of the see of *Rome*, without licence of the king, by bill signed.

And all dispensations of importance, which paid 4 *l.* for expedition at *Rome*, (and of the tax of all dispensations at *Rome* two books shall be made, one to remain with the register of the faculties, the other with the clerk in *Chancery*,) shall be confirmed under the great seal.

And all other prelates may dispense, &c. in the same manner as they could by the common law, or the custom of the realm.

And therefore, in cases in which it was generally allowed the pope might grant a dispensation, the archbishop now may grant a dispensation by this statute. *Hob.* 146.

And therefore the archbishop may grant a dispensation to take a plurality, within the *§.* 21 *H.* 8. *Vau.* 20.

But the archbishop cannot grant a dispensation by this statute, except in *spiritualibus*, in which the pope was allowed to grant *quasi de jure*. *Hob.* 147, 148.

So, the archbishop is restrained from granting dispensations in four cases where the pope granted them; as, by the statute itself he is restrained in cases repugnant to the divine law. *Hob.* 147.

And therefore he cannot grant it for a prohibited marriage. *Hob.* 147, 148.

Nor, for an alien, who does not speak *English*, and reside, to be a priest. *Hob.* 148.

Nor, for benefice to be appropriated to a nunnery. *Hob.* 148.

2. He cannot grant it in any case contrary to the *§.* 21 *H.* 8. against pluralities. *Hob.* 147. *Vide Esglise*, (N 5. 8.)

3. Nor, in cases contrary to the king's prerogative, or the laws and statutes of the realm. *Hob.* 148.

And therefore a dispensation *capere in commendam* any churches not above such a value, without mentioning that they are void, though made by the archbishop, and confirmed by the king, is not good. *R.* *Hob.* 150.

Or *capere*, without expressing a provision for the consent of the patron. *Hob.* 152.

So, 4. The archbishop by this statute cannot grant a dispensation, except in cases convenient and necessary, upon examination of the cause, and quality of the person. *Hob.* 148.

And therefore a dispensation by the archbishop, with the confirmation of the king, *capere in commendam* for years, or *quamdiu* he shall be a bishop of such a see, &c. will be void; for he is not a complete incumbent, and other inconveniences ensue. *Hob.* 153. 155.

(D 21.) *Deprivation.* For what causes it shall be.] Every offence by an ecclesiastical person, contrary to the duty of his function, may be punished by the spiritual court. 1 *Sal.* 134.

So, he may be deprived for a crime. 1 *Salk.* 134, 135.

A bishop, by the archbishop of his province, as well as a parson, vicar, or other ecclesiastical person of an inferior order, by his ordinary. 1 *Sal.* 135.

So,

So, a deprivation may be by ecclesiastical commission, as well as by the bishop, or other ordinary. *R. Jon. 393.*

And therefore a parson, &c. may be deprived, if he be an heretic. *Dal. 51.*

If he depraves the common prayer. *R. Popb. 60.*

If he be an infidel, or miscreant, which signifies a misbeliever.

So, by the *st. 13 El. 12.* if he advisedly and directly maintain doctrine repugnant to the 39 articles, and being convented before his ordinary, &c. shall not revoke his error; or, after revocation, affirm such untrue doctrine.

So, if he be a schismatic.

So, by the *st. 1 El. 2.* if he refuse to use the book of common prayer, or to administer the sacraments according to it, or use other form, or prayers, &c. or speak or preach in derogation thereof, having formerly been convicted for the like offence.

Or, by the *st. 14 Car. 2. 4.* if he read not morning and evening prayers publicly on some Lord's day within two months after his induction, and declare unfeigned assent to the use of all things contained in the book of common prayer; or, in case of lawful impediment, within a month after the impediment removed.

So, if he be convicted for any non-conformity.

So, if he be obstinately disobedient to the lawful canons of the church.

As, if he takes an incompatible benefice, without a dispensation.

If he takes a benefice by a simoniacal contract. *1 Sal. 134.*

If he be a common drunkard. *R. 1 Brownl. 70. 2 Brownl. 37. Win. Ent. 219.*

So, he may be deprived for the first offence in depravation of the common prayer; for the statute, being in the affirmative, does not take away the effect of the canons. *R. 5 Co. de Jur. Eccl. 3. 5. 2 Rol. 222. l. 30.*

So, if he be incorrigibly disobedient to his ordinary.

So, if he be guilty of murder.

Or, before the *st. 18 El. 7.* if he was convicted of any homicide, and could not purge himself. *2 Rol. 222. l. 15.*

So, since the *st. 18 El. 7.* if he be convicted of manslaughter by verdict; for though the statute ousts the purgation, it does not take away the offence. *2 Rol. 222. l. 20.*

So, if convicted for perjury in the spiritual court for a spiritual matter. *Per Holt, 1 Sal. 134.*

Or, forgery of orders. *1 Sal. 134.*

So, if he be *merè laicus*. *R. Dy. 293. Bend. pl. 234.*

So, he may be deprived for dilapidation of the church. *1 Sal. 134, 5.*

If an abbot had aliened lands, which he had in right of his abbey. *2 Rol. 222. l. 10.*

(D 22.) *The effect of a deprivation.*] A sentence of deprivation, though it be for nullity of institution and induction, as that the presentee was *merè laicus*, does not relate to make an avoidance *ab initio* so as to give a lapse to the bishop. *2 Rol. 220. l. 20.*

Or, to make the institution and induction of a clerk by *A.* after the institution of the presentee deprived, but before his deprivation, to be good. *2 Rol. 220. l. 10.*

Or,

Or, to make a marriage, administration of the sacraments, or other spiritual act by him, void. *R. Cro. El. 775. Mo. 606.*

Or, to make a lease by him, confirmed by the patron and ordinary, to be void. *R. Cro. El. 775.*

But if, after deprivation, the party deprived be restored by lawful commissioners, the sentence of deprivation is annulled, and the incumbent continues, and a presentation upon such deprivation does not supply its turn. *R. Mo. 558.*

If a deprivation be by the king, or his commissioners, who represent his person, an appeal does not lie; but the king, of grace, may grant a commission of review. *Mo. 782.*

(D 23.) *Seizure of temporalities. The nature of temporalities.*] The king is patron of all the bishoprics in the kingdom, which are of the king's foundation. *Vide Ecclesiastical Persons, (C 2.)*

So, all the bishops of *Wales* are of the patronage of the king, and he ought to grant their temporalities to them. *1 Rol. 882. l. 5.*

So, the bishops of *Ireland*. *F. N. B. 169. G.*

The temporalities of a bishop are all his temporal possessions, which belong to the bishopric. *Sav. 52.*

And during the vacancy of the bishopric, they belong to the king. *2 Inst. 15. Mod. 207.*

And the king is seised of the freehold. *1 Rol. 881. l. ult.*

And shall have the profits, take a ward, present to a church, &c. *Vide Esglise, (H 5, 6.)*

But by *M. Ch. 9 H. 3. 5. custodia archiepiscopatum episcopatum, &c. vendi non debent.*

And therefore a subject cannot claim those temporalities by grant, or prescription. *2 Inst. 15.*

So, by *M. Ch. 5.* the king shall restore the temporalities in the same plight as he had them. *2 Inst. 14.*

And a commission of *oyer and terminer* goes, to hear a trespass done in the vacation. *2 Inst. 152.*

So, a common person shall have the temporalities of an abbey, &c of his foundation. *2 Inst. 68.*

(D 24.) *How granted.*] After a bishop is elected and confirmed, the king makes restitution of the temporalities to him. *Bur. H. 11.*

So, he may grant them after election, and before consecration. *1 Rol. 882. l. 15.*

If the king limits no estate in the temporalities, yet the bishop shall have the fee. *1 Rol. 882. l. 20.*

So, though the king limits only for life, or years; for that will be void. *1 Rol. 882. l. 20.*

If a bishop elect accepts rent reserved upon a lease by his predecessor, the lease shall not be affirmed by such acceptance. *Pal. 175.*

But till a writ for restitution of the temporalities to the bishop, they are not vested in him, though he be a complete bishop. *1 Rol. 881. l. 50.*

So, after restitution, the bishop shall not have an action for a trespass done in the vacation; for the *st. Marl. 29.* does not extend to him. *2 Inst. 152.*

So, if an election be without the king's assent and licence, he may refuse restitution. *F. N. B. 170. C.*

(D 25.)

(D 25.) *How seised.*] So, for an enormous offence in a bishop, his temporalities may be seised *in manus regis*. 2 *Rol.* 228. l. 20.

As if he be attainted for trespass *contra pacem*; for, being a prelate, a *capias* does not lie against his person. 2 *Rol.* 228. l. 25.

Or, for a contempt, as upon an attachment in prohibition. 2 *Rol.* 228. l. 15. 30.

Or, for not admitting a varlet to his corody. 2 *Rol.* 228. l. 15.

So, if he be found a disturber in a *quare non admittit* by the king. 2 *Rol.* 228. l. 17.

Or, be found guilty in a *quare incumbavit*, after a *non admittas* delivered to him. 2 *Rol.* 228. l. 10.

So, upon the death of a bishop, the king by his prerogative shall have his palfrey, bason, and ewer, and kennel of hounds; and process shall issue for them, if not compounded. *Sav.* 53.

(D 26.) *Guardian of the spiritualties. Who shall be.*] During the vacation of a bishop or metropolitan, the spiritual jurisdiction belongs to the guardian of the spiritualties. *Lind.* 33. v. *Vicar. Gener.*

And the dean and chapter, of common right, is guardian of the spiritualties to a metropolitan, as to the archbishop of *Canterbury*. 2 *Rol.* 223. l. 7. 22. But the prior of *Christ-Church, Canterbury*, is said to be so. *Ibid.* l. 20. 50.

So, to the archbishop of *York*. 2 *Rol.* 223. l. 25.

So, in inferior bishoprics, the dean and chapter, of common right, is guardian of the spiritualties, and not the metropolitan. 2 *Rol.* 223. l. 10. But this seems to be by composition. *Temp. H.* 3.

But where the usage allows it, the metropolitan shall be guardian of the spiritualties; as the archbishop of *York* shall be to the bishop of *Durham*. 2 *Rol.* 223. l. 17.

So, by prescription an archbishop may be guardian of the spiritualties to a bishop within his province. *Lind.* 33. v. *Vicar. Gener.*

So, by composition, *per aliquem* by the archbishop, *electum ex nominat. per capitulum*. *Lind.* 33. v. *Vicar. Gener.*

(D 27.) *What he may do.*] The guardian of the spiritualties regularly may exercise all spiritual jurisdiction. *Sav.* 52.

As, he may make admission and institution. 2 *Rol.* 223. l. 40.

So, a writ shall be directed to him for trial of bastardy, &c. and he shall make a certificate of it. 2 *Rol.* 223. l. 44. *Vide Certificate*, (A 4.)

So, he shall prove wills, grant administration, licences for marriage, &c. *Sav.* 52.

(D 28.) Jurisdiction Temporal.

(D 28.) *Erection of courts.*] The king, by his prerogative, may make what courts for the administration of the common law, and in what places, he pleases. *Vide Courts* (A).

But the king cannot erect a court of *Chancery*, or conscience; for the common law is the inheritance of the subject. 2 *Rol.* 164. l. 30. *Vide Chancery*, (A 3.)

Nor, grant a liberty *tenere placita*, according to the course of the civil law. 2 *Rol.* 164. l. 25.

Nor,

Nor, grant that the court of *York* shall hold plea, by *English* bill, of an obligation, or other matter triable at the common law. *R. 2 Rol. 164. l. 32.*

Nor, grant that such an one shall not be impleaded by action. *2 Rol. 164. l. 20.*

So, the erection of a new court, with a new jurisdiction, cannot be without an act of parliament. *4 Inst. 200.*

And if it be erected, the jurisdiction ought to be expressed; for nothing omitted shall be within such jurisdiction. *Ibid.*

So, the king cannot grant to a court, that it may proceed according to the civil law. *2 Rusb. App. 77.*

Nor can, by charter or commission, &c. alter the common law. *Ibid.*

For the appointment of justices, *vide post.* (D 37.)

(D 29.) *Grant of commissions.*] The king may grant such commissions as are warranted, or allowed, by the common law, or by act of parliament. *4 Inst. 163. 2 Inst. 51. Vide Justices, (C 2.)—(G 1, &c.)*

Commissions are general, as to persons, crimes, &c. as a general commission of *oyer and terminer.* *4 Inst. 162.*

Or, special, when confined to particular persons, offence, or place. *4 Inst. 163.*

As, upon a heinous trespass done, which requires *festinum remedium.* *Reg. 123. By the st. W. 2. 13 Ed. 1. 29.*

Upon heinous exactions, &c. by a bishop and his ministers. *Reg. 125. b.*

But the king cannot grant a commission not usual, nor allowed by act of parliament. *4 Inst. 163. 2 Inst. 478.*

And therefore by the *st. 18 Ed. 3. st. 2. 1.* (*2*, if not expired? *vide Cay's Statutes*;) a commission of new inquiry is declared void.

So, by the *st. 18 Ed. 3. st. 2. 4.* a commission for assaying weights and measures.

So, a commission for making of boats, &c. *4 Inst. 163.*

So, a commission to apprehend a felon, and seize his lands and goods. *2 Inst. 54.*

So, the king cannot grant a commission for inquiry only, without power to hear and determine. *R. 12 Co. 31. Semb. 2 Rol. 164. l. 47.*

So, a commission ought to specify the offences in the commission, not in the schedule annexed. *R. 12 Co. 31.*

So, a commission for a trespass done shall be only to the justices of the one bench, or the other, or justices in *eyre.* *Stat. W. 2. 29. st. 2 Ed. 3. 2. Vide Justices, (E 1, &c.—G 1, &c.)*

And it shall not be in *English.* *R. 12 Co. 31. (By the st. 4 Geo. 2. 26. all commissions, &c. are to be in English.)*

(D 30.) *Grant of franchises and liberties.*] So, all franchises are derived from the king; and therefore the king may grant to another to have any franchise or liberty. *Vide Franchises, (A 1.)—Liberties.*

As, a county palatine, or jurisdiction temporal or ecclesiastical. *Vide Franchises.—Vide ante, (D 9, &c. 28, 29.)*

Nomination of his officers; as sheriff, coroner &c. *Vide London, (G—K 1, &c.)*

So,

So, the execution of things incident to the office of another; as, *retorna brevium. Vide Retorn.*

Quod uti possit regalibus libertatibus in manerio suo. 2 Rol. 202. l. 35.

Omnem potestatem, omnes libertates, et consuetudines, quæ regia potestas conferre potest, omne jus, et omne dominium quod ad nos pertinet, &c. 2 Rol. 199. l. 20.

(D 31.) *Of nobility and honour.*] So, the king, by his prerogative, is the fountain of all dignity and honour in his realm. *Vide Dignity (A).*

So, he may, by the common law, compel persons of 20 l. per annum inheritance to be knights. *Vide Homage, (G 4.)*

Or, persons named to be serjeants, to take the degree. *2 Rol. 167. l. 10. Vide Ley, (D 2.)*

(D 32.) *Of privileges.*] So, all privileges are derived from the king; and therefore the king may grant to another to have the privilege of a forest, chase, warren, park, &c. *Vide Chase.*

To have a fair or market, or toll in it. *Vide Market, (C 1, 2.)*

To have casual profits; as wreck, waifs, strays, deodands, treasure-trove, royal fish, mines, derelict land, &c. *Vide post. (D 49, 50.)—Waife.*

So, privileges in trade. *Vide Trade (B).*

(D 33.) *Of exemptions.*] So, the king, by his grant, may exempt a subject from a charge, which by his grant he may impose; as, he may grant to the citizens of any town, &c. to be quit of toll for their merchandize in every town and city of England. *2 Rol. 198. l. 37. 45. Vide Toll, (G 2.)*

So, he may grant an exemption from toll in the king's market, though due by prescription. *R. 2 Jon. 119.*

So, the king, by grant, may exempt citizens from all *tallagiis, auxiliis, vigiliis, & contributionibus ratione terrarum et merchandisarum*, in a city. *2 Rol. 199. l. 5.*

From customs and tallages. *2 Rol. 199. l. 25.*

De auxiliis vicecom. de foresta. 2 Rol. 199. l. 1.

So, *de vastis, assart. and regard. forestæ. 2 Rol. 199. l. 2.*

To be quit *de foresta. 2 Rol. 202. l. 5.*

So, he may grant exemption from a summons before justices in eyre. *2 Rol. 198. l. 40.*

From service in *jurat., assis, &c. 2 Rol. 199. l. 5.*

So, the king may grant exemption from an office; as *quod non sit mayor, alderman, sheriff, escheator, coroner, &c. Ibid.*

[Constable, or any other office under the crown, provided there be a sufficient number of persons left to serve the office. *1 Term Rep. 686.*]

But an exemption from the office of constable, and other offices in the *Cinque Ports*, does not exempt him from the office of sheriff. *R. Sav. 43.*

So, an exemption from offices in the *Cinque Ports* does not exempt from the office of sheriff in a county. *Ibid.*

So, the king may grant an exemption from attendance upon courts of justice; as, of the shire, hundred; *de sectis* of shire and hundred. *2 Rol. 198. l. 52.*

De placitis foreste. 2 *Rol.* 199. l. 1.

So, the king may grant an exemption from a charge in which the king has no interest at the time of the grant; as, to a spiritual man, that he shall be discharged of tithes, when they shall be granted by the clergy. 2 *Rol.* 198. l. 25.

To a man that he shall not be impeached by a recognizance, into which he shall afterwards enter. 2 *Rol.* 168. l. 30.

But the king cannot grant an exemption from the jurisdiction of any court, if he does not erect another jurisdiction of the same nature; for that would be a failure of justice; as he cannot exempt a town from the admiralty jurisdiction, if he does not grant a power to have a like jurisdiction there. 2 *Rol.* 201. l. 45.

So, he cannot grant a power to hold a court of equity; for that would be in derogation of the common law. 2 *Rol.* 192. l. 37. *Hob.* 63. *Vide Chancery*, (A 3.)

So, if he grants an exemption from the shire and hundred, the grantee has thereby frank-pledge and tourn within his own land. *Semb.* 2 *Rol.* 203. l. 20.

So, the king cannot grant to any to be exempt from punishment for any offence; as, for felony, trespass, &c. 2 *Rol.* 192. l. 32. 35.

So, if the king grants an exemption from customs, that exempts him only from the antient customs, which were the king's inheritance. *Vau.* 161.

So, a grant of exemption from all taxes, impositions, &c. does not exempt from such armour, &c. as he ought to find by act of parliament. *R. Sav.* 52.

(D 34.) *Inhibitions to restrain within the kingdom.*] So, the king, at his pleasure, may command any subject that he shall not go beyond sea, or out of the kingdom, without his licence. *F. N. B.* 85. A. 3 *Inst.* 179. *Vide Chancery* (4 B).

And if he does contrary, he shall be fined to the king for his contempt. *F. N. B.* 85. A. C.

And such inhibition may be by proclamation; for the party may abscond. *F. N. B.* 85. C.

Or, by writ under the great seal, privy seal, or signet; for every one is bound to take notice of each of the king's seals. *F. N. B.* 85. A.

And such writ may be directed to the party himself, commanding him not to go out of the kingdom. *F. N. B.* 85. B.

Or, to the sheriff, commanding that he take surety of him *quod ne exeat*, and if he refuses, to commit him to gaol. *F. N. B.* 85. D. *Vide* 3 *Inst.* 179.

So, it may be directed to justices of peace, as well as to the sheriff, or to both. *F. N. B.* 85. E.

Every one upon surmise to the *Chancery*, may sue this writ for the king. *F. N. B.* 85. F. *Vide Chancery* (4 B).

So, the king, for the service of his war, or other reasons of state, may lay an embargo upon a ship. *Per Saunders*, *Skin.* 93.

Adm. in case of emergency. *Skin.* 335.

So, he may inhibit a public nuisance. *Semb.* *Skin.* 630. *Vide post.* (D 36.—*Action upon the Case for a Nuisance*, (D 4.)—*Prohibition*, (A 3.)

But by the common law, every one, not restrained by writ or proclamation, might go out of the realm to merchandize, or for other cause, at his pleasure. *F. N. B.* 85. *A. Dub. Dy.* 165. 3 *Inst.* 179. *R. Dy.* 296. *a.*

And the *st.* 5 *R.* 2. 2. which restrains all, except lords, merchants, and soldiers, is repealed by the *st.* 4 *Jac. c.* 1. *f.* 22.

So, if the king grants licence for a time certain, it cannot be revoked. *Dy.* 177.

(D 35.) *To recal a subject, who is out of the kingdom.*] So, if a subject goes out of the kingdom without the licence, or with the licence of the king, and a messenger, by command under the great or privy seal, summons him to come back into the kingdom, and he does not return at the limited time, he forfeits all his goods and lands to the king for his contempt. *R. Dy.* 128. *b.* 3 *Inst.* 179.

And this extends to every subject ecclesiastical, or lay lord, or other. 3 *Inst.* 179.

If a messenger serves such command, he ought to make a certificate of it in *Chancery* upon his oath; and if such certificate be transmitted to the *Exchequer* by *mittimus*, a commission goes to seise his lands and goods. 3 *Inst.* 180.

But merchants may abide beyond sea, though it be not to merchandize. *Ibid.*

A king, in amity with the king of *England*, need not deliver up subjects of this realm who fly to him. *Ibid.*

(D 36.) *To restrain annoyances.*] So, the king, by his prerogative, may command the mayor and bailiffs of any city or borough, or town corporate, *quod omnes vicos et venellas in villa prædictæ de finis et aliis fœditatibus mundari et mundat. conservari faciant.* *F. N. B.* 185. *D.*

And if it be not done, there shall be an *alias*, *pluries*, and attachment. *F. N. B.* 185. *D.*

But such writ does not lie for villages in the country, not corporate. *Ibid.*

But the king cannot inhibit a lawful occupation upon pretence of inconveniences ensuing; as he cannot suppress the making of cards within the realm. *R.* 11 *Co.* 87. *b.* *Vide Trade*, (D 1.)

Or, the making of dice, bowls, balls, &c. though they serve only for pleasure. 11 *Co.* 87. *b.*

Or, the making of hawks' hoods, bells, &c. dogs' couples, &c. *Ibid.*

So, the king cannot restrain the exercise by foot-ball, casting the bar, cock-fighting, *aut alios vanos ludos.* 11 *Co.* 87. *b.*

(D 37.) Nomination of Officers.

The king, by his prerogative, has the nomination of all public officers within his kingdom. *Vide Officer*, (A 1.—E 1, &c.)

As, of the chancellor, treasurer, &c. *Vide Chancery*, (B 1.)—*Courts*, (D 8.)

Though claimed by parliament, 15 *Ed.* 3. 2 *Rol.* 164. *l.* 45.

But the king cannot create a new office, with a fee to be taken of the subject, without the assent of parliament; for that would be a tallage upon the subject, without his consent in parliament. 2 *Inst.* 533.

And therefore where the king by letters patent made an officer for the

the measuring of cloth and canvas, with a new fee for it, the grant was void. 2 *Inst.* 533.

Or, for measuring worsteds. 2 *Inst.* 534.

Or, for registering inventories, births, aliens, &c. *R.* 12 *Co.* 116.

So, the king cannot erect an ancient office with a new fee to be taken of the subject. 2 *Inst.* 533.

So, the king cannot make a new office by letters patent, for the survey or correction, &c. of any thing within the jurisdiction of another court. 4 *Inst.* 262.

As, for the issuing *latitats*, &c. 12 *Co.* 117.

Or, the registering of judgments, recognizance, fines, or deeds, &c. *Ibid.*

Or, for the inspection or examination of accounts, deceits, &c. by the officers of any court. *Ibid.*

How officers are created, and their authority and duty, *vide* title *Officer*.

(D 38.) Prerogative as to Trade.

So, the king, by his prerogative, may erect societies for the management of trade. *Vide* *Trade* (B).

So, for the public good, the king may grant an embargo upon a merchant-ship, &c. 1 *Sal.* 32. 3 *Lev.* 353.

But an embargo shall not be allowed, if done for the benefit of a private trader or company. *R.* 3 *Lev.* 353. 1 *Sal.* 32.

So, the king cannot grant a seizure of a ship or goods, if it trades without licence of such a company (admitting that he can give the sole trade there to a company). *R.* *Skin.* 135.

Neither can he give the forfeiture of goods by charter; and therefore, if the king grants power to the dyers to search cloths, and if they find any dyed with logwood, they shall be forfeited, it shall be void. 8 *Co.* 125.

When the king shall take reprisals, *vide ante*, (B 4.)

(D 39.) Prerogative as to the King's Revenue.

(D 39.) *Coinage*.] The king alone, by his prerogative, can make or coin money within his dominions. *R.* *Dav.* 19. *Vide* *Money*, (B 5.)

And the benefit of coinage was part of the king's revenue.

And the duty, *temp. Ed.* 3. was 5 *s.* out of every pound of gold, out of which the king paid 1 *s.* or 18 *d.* to the master of the mint. Upon every pound of silver 8 *d.* in weight, or 1 *s.*, out of which the king allowed to the master 8 *d.* or 9 *d.* *Hale Sh. Acc.* 3.

Temp. H. 5. the duty for coinage of a pound of silver was 15 *d.* *Hale Sh. Acc.* 3.

[By *stat.* 9 *Geo.* 3. c. 25. the coinage duties in *stat.* 18 *C.* 2. &c. are made perpetual.]

(D 40.) *Aids*, &c.] The king, by his prerogative, is entitled to have aid *pur faire son fitz chivaler, ou son eigne file marier*. *Mad.* 396. *Vide* *Aide* (A). *Vide* the *st.* 12 *Car.* 2. 24. whereby this is taken away. *Vide* *Parliament*, (H 9.)

(D 41.) *Purveyance*. In *saltpetre*.] The king by his prerogative had the privilege of purveyance for defence of his realm, or provision of his household.

As, the king has purveyance of saltpetre for gunpowder, though it was invented only in the time of R. 2. for it would be to the peril of the kingdom, if he could not take it within his dominion, but must apply for it to foreign princes. R. 12 Co. 12, 13.

And therefore the king's ministers may dig for saltpetre to make gunpowder for the safeguard of the realm, in the lands, stable, ox-house, or cellar of a subject. R. 12 Co. 13.

In the ruins of buildings. 12 Co. 14.

And may throw down mud-walls, if the house be well defended. *Ibid.*

But he cannot dig where he cannot leave the place in the same plight as before, without prejudice to the owner; as, in the floor of a mansion-house. R. 12 Co. 13. R. 2 Rol. 169. l. 10.

Nor, in the floor of a barn, where corn or hay lies; for it would be useless for a long time. 12 Co. 13.

Neither can he impair the wall or foundation of any house, out-house, &c. 12 Co. 13.

And where he digs, he ought afterwards to put it in as good plight as before. 12 Co. 13, 14.

So, in cellars he cannot remove the vessels of the owner, and in stables, &c. must leave room for his horses and cattle, &c. 12 Co. 14.

He cannot fix a furnace, &c. upon his soil, where it may prejudice him, without his consent. R. 12 Co. 14.

So, he ought to dig in convenient time before sun-set. *Ibid.*

And cannot return to dig at the same place in a long time. 12 Co. 14.

And the owner cannot be excluded from digging for saltpetre also, in his own soil. R. 12 Co. 14.

So, the king cannot grant, demise, or assign such privilege to another; for it is inseparable from the crown. R. 12 Co. 13. R. 2 Rol. 187. l. 40.

And saltpetre dug for the king ought to be employed for the defence of the realm. R. 12 Co. 13.

(D 42.) *In other necessities.*] The king cannot take gravel in the land of a subject without his consent, for repairing of his palace. 12 Co. 12.

Nor, timber, &c. 12 Co. 12.

Nor, to make a wall, bridge, &c. about his royal house. *Ibid.*

[By ff. 12 Car. 2. c. 24. none by authority under the great seal, &c. shall purvey, &c. for the king, queen, their children, or household, any timber, fuel, cattle, grain, hay, victual, carts, carriages, &c. without free consent of the owner, &c.]

(D 43.) *Customs. Magna Custuma.*] The customs upon merchandise, exported and imported, are the antient inheritance of the crown. Dav. 8. a. 10. b. Dy. 43. b. Vau. 161, 2. said, that they were originally granted by parliament. *Vide Parliament*, (H 11.)

And they comprehend that which is known by the name of *magna & antiqua custuma*, viz. 6s. 8d. for every sack of wool, 6s. 3d. for every 300 woolfells, and 13s. 4d. for every last of hides. Dav. 8. *Vide Parliament*, (H 11.)

And

And this custom was as antient as the crown itself. *Dav. 8. b.*
But *semb.* that it began by parliament, 3 *Ed. 1.* 2 *Inst.* 59. 4 *Inst.* 29.
Vau. 162. Forst. 15.

The same custom granted in *Ireland.* 2 *Rol.* 177. l. 10. 35.

And upon a stranger the custom paid was 10s. for a sack of wool;
10s. for 300 woollfells, and 20s. for a last of hides. 2 *Rol.* 178. l. 15.

(D 44.) *Parva Custuma.*] *Parva, sive nova custuma,* was granted
by charter, 31 *Ed. 1.* before which the king took as much as he
pleased. *Dav. 8. b. 9. b.*

By which charter it was ascertained, that the king should take only
3d. per pound of merchants strangers for all goods imported or ex-
ported. *Dav. 8. b.* 2 *Rol.* 178. l. 25. besides 2s. *pro dolio vini*, 40d.
pro sacco lanae, *lasto cor.* and 300 woollfells, &c. *Vide the Charter,*
Forst. 22.

And there shall be two receivers chosen for it in every town and
port. 2 *Rol.* 176. l. 50.

(D 45.) *Prisage, &c.*] *Prisage* is a duty of two tons out of a ship
laden with twenty tons of wine, or more; one to be taken before the
mast, the other behind the mast. *Dav. 8. b.* 4 *Inst.* 30. 1 *Rol.* 145.
Mad. 525. 3 Bul. 3. 21.

It was insisted, that there ought to be two tons of a ship laden with
thirty tons of wine; but the king granted that it should be taken as
usual. 2 *H. 4.* 2 *Rol.* 162. l. 35.

Butlerage is 2s. per ton for every ton of wine paid by merchants
strangers in lieu of prisage, which was remitted to them by charter,
31 *Ed. 1.* *Dav. 8. b.* 4 *Inst.* 30. 1 *Rol.* 145.

And ought to be paid when the ship comes into port, and breaks
bulk. 1 *Rol.* 140. 144. 3 *Bul.* 4.

And the customs shall not be accepted till the prisage delivered.
Sav. 33, 4.

So, it shall be paid for wine imported by a corporation, though a
grant be, that none shall be taken *de bonis civium*; for this extends only
to the goods of each citizen in his natural capacity. 1 *Rol.* 142.

So, for wine, which a citizen and others jointly import. *Ibid.*

For wine which the executor of a citizen imports. 3 *Bul.* 4

Or, which a citizen, as executor, imports. *Ibid.*

Or, which a citizen imports, who has not his habitation in the
city. 3 *Bul.* 9. 14.

But the barons of the *Cinque Ports* claim to be free of prisage by
prescription. 2 *Rol.* 163. l. 27. *Hard.* 308.

So, others may be exempt by prescription. 1 *Rol.* 146.

So, persons may be exempt by the king's grant, 1 *Rol.* 142.; as, the
citizens of *London* are exempted for wine imported there, but not for
wine imported elsewhere. *R. Hard.* 310.

And the exemption shall be allowed, though the citizen dies be-
fore bulk broken. *Hard.* 302. *Noy,* 97. 3 *Bul.* 1—26.

So, a man by the king's grant, may have the benefit of prisage.
Dub. 2 *Rol.* 187. l. 37. 1 *Rol.* 142.

So, no duty shall be paid for prisage, if under ten tons be *bona*
fide imported; as, seven or eight tons. *Hard.* 477.

Or, nine tons, unless there be an express proof of fraud. *Ibid.*

Yet, where nine tons and an half were imported, it was decreed that prisage should be paid; for it is an apparent fraud. *R. Hard.* 57. 218. 477.

So, no duty, if ten tons laden, by leakage, are reduced to nine tons. *Hard.* 477.

So, it shall not be paid, except where the wine is imported from a foreign kingdom by a merchant, and not for private use. *1 Rol.* 145.

(D 46.) *But other customs not allowed.*] But by the *st.* 25 *Ed.* 1. 7. the *maletolt* upon wools, &c. shall be abolished. *Vide Parliament,* (H 9. 15.)

And by the *st.* 36 *Ed.* 3. 11. nothing shall be taken but the antient custom. *2 Rol.* 177. l. 25.

(D 47.) *Customs not paid by a patentee.*] If the king grants to *B.* goods seized by him from pirates, no customs shall be paid by the patentee; for the king shall not pay customs to himself. *R. 2 Rol.* 180. *H. Lane,* 15.

So, the king may grant to a merchant alien to be exempt from all customs, except such as a subject pays. *Vau.* 161.

(D 48.) *Impositions, &c.*] So, the king by his prerogative may charge an imposition upon the subject for his benefit; as, he may grant a certain rate for things sold in a town, *pro muragio* of the town, or *pro ponte reparanda*, or for the security *partium illarum*, *2 Rol.* 171. l. 45. 50. 172. l. 5. *12 Co.* 12. *Vide Toll* (A).

And may grant it for a limited term, and that then it shall cease, *2 Rol.* 171. l. 40. 50. 172. l. 5.

So, that a man shall make the wall of a town, or a bridge, *de novo*, and shall take so much for goods sold, or which pass there. *2 Rol.* 171. l. 25.

So, that any person may erect a ferry upon a water next to his land, and shall take so much for passage. *2 Rol.* 171. l. 30.

So, the king may grant to another to have toll in his market, &c. *2 Rol.* 202. l. 42. *Vide Market,* (F 1.)

But the king cannot charge the subject with an imposition, where he has no benefit by it, or a *quid pro quo*. *2 Rol.* 272. l. 40. *2 Inst.* 220.

So, he cannot charge a new impost upon any merchant. *2 Inst.* 58.

Nor, levy new customs. *2 Inst.* 60.

Nor, enlarge the antient customs. *Ibid.*

So, a grant by the king, that a merchant, who imports wine at any other port than the port of *S.* shall pay treble customs, is void. *2 Inst.* 61.

So, the king cannot grant, that a merchant shall pay so much for searching or measuring his goods. *2 Inst.* 62.

That he shall not import wine without paying so much, on pain of forfeiture. *2 Inst.* 63.

That a merchant shall pay 5*s.* *per cent.* for all currants, or other foreign commodity, imported. *2 Inst.* 63. *R. cont. in Exch.* 4 *Jac. Lane,* 30. *2 Rush.* 73.

So, merchants cannot by their consent grant to the king a tax upon their goods; for their wares would thereby be sold the dearer. *2 Rol.* 173. l. 20. 25.

(D 49.)

(D 49.) *Casual profits. The goods of no person.*] The king, by his prerogative, is entitled to all goods which have no owner; as, wreck, *flotjan, jetsan, legan, &c.* of which, *vide Wreck* (A).

So, to waives, strays, &c. *Mad. 234. Vide Waife*, (A 1, 2.—F.)

To goods forfeited, or confiscated, *bona felon., fugitivor., utlagator., et in exigend. possitor., &c.* *Vide Waife* (B—C—D).

To deodands, treasure-trove, &c. *Vide Waife* (E 1, 2.—G).

To lands, &c. which escheat. *Vide Escheat.*

Or, come to the king by forfeiture, seifure, &c. *Mad. 202. Vide Forfeiture*, (B 1. &c.)

So, to wards, marriages, reliefs. *Mad. 216.*

(D 50.) *Royal mines and fishes.*] As, to royal mines, *vide Waifes*, (H 1, 2.)

By the common law, and now it is declared by the *st. prer. regis 11. rex habebit wreccum maris, balenas, & sturgesiones capt. in mari, vel alibi infra regnum. Pl. Com. 315. 7 Co. 16. a. Dav. 56. a. Stamf. Prer. R. 38.*

So, the fishery of every navigable river, as high as the sea flows and reflows, belongs to the king, by his prerogative. *2 Rol. 170. l. 20. Dav. 56. Dougl. 441—446. (425—429.)*

But every one may fish in the sea, of common right. (*Mod. Ca. 73.*)

Though it flows upon the soil of another.

But foreign nations cannot fish in the *British* seas, without the king's licence. *Vide ante*, (B 1.)

So, a man, by grant or prescription, may have a free fishery in navigable rivers. *Cal. 26. Vide Piscary* (A).

So, a man, by grant or prescription, may have a several fishery. *Cont. Mod. Ca. 73. (Sal. 357.)*

So, he may claim royal fish, as *balenas & sturgesionis*, within his manor.

So, by grant he may have a free fishery in a bay or creek of the sea. *Dav. 57. a.*

So, rivers not navigable, and the fishery in them, of common right belong to the terre-tenants *ex utraque parte. Dav. 56. a. 2 Rol. 170. l. 25.*

Or, if it runs between two manors, the one lord has one moiety, and the other the other moiety. *Dav. 57.*

As, to remedy for encroaching on the fishery of another, *vide Piscary.*

(D 51.) *Fines. Fine upon an original.*] As to a fine *pro licentia concordandi* upon a fine levied, *vide Fine*, (E 8.)

As, to a fine for alienation without licence, or pardon of such alienation by the king's tenant, *vide Alienation*, (A. 1, 2.)

A fine shall be paid in the hanaper for the king's writs. *8 Co. 59. b.*

As, upon every original in a real action shall be paid in the hanaper *6s. 8d.* for every parcel of land in demand, which is of the value of five marks *per ann. 2 Inst. 511.*

So, antiently a fine was paid for liberty to have right and justice. *Mad. 293. But by the st. M. Ch. 29. nulli vendemus, &c.*

To have an inquisition taken upon any particular point in dispute, *Mad. 300.*

For expedition, or respite of proceedings in law. *Mad.* 308, 309.

But by the *st. M. Ch.* 9 *H.* 3. 26 & 29. it was provided, *quod nihil de cetero detur pro brevi inquisitionis ab eo qui inquisitionem petit de vita aut de membris, (viz. for the writ de odio & atia, 2 Inst. 42.) sed gratis concedatur.*

Nulli vendemus, nulli negabimus, aut differemus justitiam, aut rectum.

So, by the *st.* 8 *Ed.* 3. no fine shall be for a writ of course, and grace shall be for a writ *de gratia.* *Cot. Ab.* 15.

(D 52.) *For Beau-pleader, &c.*] So, there was an antient revenue of the king, to have a fine for *beau-pleader*, which was set at the will of the judge of the court, or reduced to certainty by consent, and annually paid. *H. Sh. A.* 35.

And it was originally imposed for bad pleading to the count, or plaint, which was in delay of justice, and therefore a contempt to the court. *2 Inst.* 123.

But by the *st. Marl.* 52 *H.* 3. 11. all fines for *beau-pleader* in eyre, county, hundred, or court-baron, are taken away.

And a writ lies if they are taken contrary to such statute. *2 Inst.* 123.

Yet fines certain for *beau-pleader* are not taken away by that act, *2 Inst.* 123.

So, a fine for suit. *H. Sh. A.* 35.

For not attending the sheriff's tourn. *Ibid.*

For assart, or purpresture, in the king's waste or forest. *H. Sh. A.* 36. *Vide post*, (D 54.)

Fines in the county-court, tourn, or other court of the sheriff. *H. Sh. A.* 43. *Vide Leet*, (N. 1, &c.)

(D 53.) *For a grant of liberties, &c.*] So, there was an antient revenue of the king, to have a fine for a grant of liberties. *Mad.* 272. 588.

And if the fine proffered was not accepted, he might make an augmentation, which was called *crementum finis.* *Mad.* 273.

So, to have an office or surrender it. *Mad.* 315.

To be bailed, or delivered out of prison. *Mad.* 341.

But if he had not the thing, for which the fine was proffered, the party should be acquitted of the fine; though sometimes a fine was paid for such acquittance. *Mad.* 272.

(D 54.) *For a misdemeanor.*] So, the king by his prerogative might fine persons, having 20*l.* *per ann.* who refused to be knights. *Vide Homage*, (G 4.)—*Leet*, (N 1, &c.—O 1, &c.)

Or, persons who refused to take the degree of serjeant, when commanded by the king's writ. *2 Rel.* 167. *l.* 15. *Vide Ley*, (D 2.)

So, a fine may be imposed for the penalty of an offence, or contempt, committed against the king. *Co. L.* 126. *b.* 8 *Co.* 59. *b.*

By whom it may be imposed, for what cause, and in what manner, *vide Leet*, (N 1, &c.—O 1, &c.)

A fine may be imposed, where a man is indicted and convicted for any trespass or misdemeanor.

Or, for purpresture, or other trespass in a forest. *Mad.* 272. *Vide ante*, (D 52.)

(D 55.) *Fines, &c. belong to the king.*] The king, by his prerogative, shall have all fines paid for writs, or imposed for crimes.

And therefore, if upon a conviction for extortion, a man be fined to pay so much to the party grieved, (unless where by act of parliament it is directed,) it is error. *R. 11 Car. 1. 1 Rol. 220. l. 10.*

And a fine shall not be allowed by the court to the patentee of the king, till the patent pleaded, or an order by the court of *Exchequer*. *Skin. 12.*

(D 56.) *By whom levied, and how.*] The sheriff, by his office, ought to collect, and account for all fines due to the king within his county. *Vide Viscount, (C 5.)*

If an under-sheriff having process for levying an amerciamment due to the king by *A.* be indebted to *A.* by bond to a greater sum, and he pays to *A.* the surplus, and takes up his bond; the debt is levied, and *A.* ought to be discharged. *R. Lane, 74.*

[Justices of peace ought in all cases to return convictions to the sessions, whether an appeal lies or not, that the crown may not be deprived of its share of the forfeitures. *2 Term Rep. 285.*]

(D 57.) *When they shall be estreated.*] So, if fines belong directly to the king, they may be estreated into the *Exchequer*; as, a fine imposed in the king's leet. *Hard. 471.*

[When a recognizance is estreated in *B. R.* it must be carried to the *Exchequer* by the puisne judge. *Rex v. Ridpath, Fort. 358.*]

[When a fine on an indictment is estreated, it cannot be discharged without attorney-general's acknowledging satisfaction in the *Exchequer*. *Rex v. Carr, in Sc. P. 1718, Bunb. 40.*]

[*B. R.* cannot receive a fine set by an inferior court. *Rex v. Elliot, M. 1 G. 2. Str. 786.*]

[By *st. 32 G. 2. c. 14.* post-fines shall be paid to the receiver of pre-fines at the alienation-office, who shall pay them to the sheriff or the grantees, on producing *quietus*, or schedule, of the foreign opposer.]

By the *st. 22 & 23 Car. 2. 22.* all fines, post-fines, issues, amerciamments forfeited, recognizances, monies paid in lieu or satisfaction of any of them, and all forfeitures whatsoever set, &c. in *B. R. C. B.* or *Exchequer* from the beginning of *Hilary* term to the beginning of *Trinity* term, shall be estreated into the *Exchequer* yearly, the last day of *Trinity* term; and all others shall be estreated the last day of *Hilary* term, on pain of 5*l.* to the officer, who ought to estreat, &c.

Provided that issues and post-fines in *C. B.* and issues in the office of the pleas in the *Exchequer* shall be termly certified, as before.

And all set, &c. by a judge of assize, clerk of the market, and commissioners of sewers, between *Michaelmas* and *Easter*, shall be estreated before the first day of *Trinity* term, and all others before the first day of *Hilary* term, on the like penalty.

And all clerks of the peace, and town-clerks, shall deliver to the sheriff within twenty days after *Michaelmas*, a perfect estreat of all set, &c. at their sessions before *Michaelmas*; and those at other sessions on the second *Monday* after *cras. animarum* yearly, on the like penalty.

And no officer shall discharge, or conceal, or wittingly miscertify any fine, &c. on pain of treble the value.

And

And when a fine, &c. is estreated, &c. process of green-wax shall go forth for levying the same.

By the *stat. 4 & 5 W. & M. 24.* this act was made perpetual.

And by the *stat. 3 Geo. 15.* over and above the said penalties, the barons of the *Exchequer* may amerce any clerk of assize, of the peace, of the sewers, market, town-clerk, &c. for omitting to return estreats in due time; to be levied as other amerciaments used in the said court to be levied.

[By *stat. 4 G. 3. c. 10.* the barons of *Exchequer*, on affidavit and petition, may discharge recognizance estreated, without a *quietus fuerit*, except where other debt is due to the crown, or for contraband trade, or assaulting officers.]

(D 58.) *Amerciaments.*] So, the king, by his prerogative, shall have all amerciaments; and this was part of the king's revenue. *Mad. 365. Vide Leet, (O 1, &c.)*

So, the king, by his patent, may grant all issues, amerciaments, &c. by general words. *2 Rol. 194. l. 40.*

And they shall be estreated into the *Exchequer*, and the grantee shall sue to the court there by petition. *Semb. 9 H. 6. 27. b.*

Otherwise, if the grant adds, to be levied, *per se aut ministros suos.* *Semb. 9 H. 6. 27. b.*

But the patentee shall not have, by those general words, issues, fines, or amerciaments in any court of *Westminster*, without express mention of them. *2 Rol. 196. l. 5.*

Nor, before justices of peace, in *eyre*, assize, or gaol-delivery. *2 Rol. 196. l. 5.*

Nor, before the *Marshalsea*, or clerk of the market. *2 Rol. 196. l. 5.*

Nor, fines, amerciaments, &c. of constables or other officers, not expressly named. *2 Rol. 196. l. 10. 1 Rol. 142.*

Nor, amerciaments of tenants, who hold of the king and another. *1 Rol. 142.*

Nor, pains, &c. inserted in a *subpœna*, injunction, *habeas corpus*, or other writ. *Hard. 377.*

(D 59.) *Escheats, wardships, primer seifins, &c.*] The escheat of all lands, which are held of the king, belongs to the king. *Vide Escheat, (A. 1, 2.)*

As, of all lands in *London*; for they are held of the king. *F. N. B. 144. G.*

So, if a man be attainted for high treason, the escheat of all his lands belongs to the king, of whatever lord they are holden. *Vide Forfeiture, (B 5.)*

By the *stat. Prær. R. 17 Ed. 2. 12.* the king shall have the escheat of the lands of all *Normans* and aliens, *cujuscunque feodi fuerint*; and this was only an affirmance of the common law. *Stamf. Prær. R. 38.*

So, by the *stat. Prær. Reg. 17 Ed. 2. 14.* the king shall have the escheat of the tenants of a bishop, for an offence *tempore vacationis cum temporalia sunt in manu regis.*

And the king shall have the escheat, if the offence was when the temporalities were in the king's hands; though they were restored before conviction. *Stamf. Prær. R. 41. b.*

So,

So, by the *stat. Prær. Reg.* 17 *Ed.* 2. 1. the king shall have the wardship of lands, which his tenant *in capite* by knight's service had in his seisin at his death, *de quocunque tenuerit, usque plenam ætatem haredis.*

And by the *st. Prær. Reg.* 17 *Ed.* 2. 2. he shall have the marriage of every one, whose lands he hath in ward.

And this, though there be a devise to charitable uses. *R. Jon.* 428.

So, by common law, confirmed by the *stat. of Marl.* 52 *H.* 3. 16. & *Prær. Reg.* 17 *Ed.* 2. 3. the king shall have *primer seisin* of all lands, of which his tenant in chief was seised in fee. *Stamf. Prær.* 12. [*Vide the st. 12 Car.* 2. 24. whereby all wardships, liveries, *primer seisins*, *ouster le mains*, values and forfeitures of marriage, &c. are taken away.]

(D 60.) *Forfeitures, penalties.*] So, the king, generally, shall have all forfeitures for high treason. *Vide Forfeiture*, (B 1, &c.)

And the king, by privy seal, may enable a court to compound, or discharge such forfeitures.

Or, after forfeiture, may grant the penalties to another. 7 *Co.* 37.

But such grant will be void before the penalty forfeited. *R.*

7 *Co.* 37. [*Vide st. 1 W. & M. st.* 2. c. 2.]

So, the *Exchequer*, having a privy seal to compound, may compound after such grant. *R. Hard.* 334. 395.

[The barons of *Exchequer* (by the privy seal) may discharge a penalty fixed by statute (after judgment) as well as a fine set by the judgment of a court. *Rex v. Dibbens*, *H.* 26 *G.* 2. *Parker*, 165.]

The king cannot grant the penalty to be levied otherwise than the statute directs. 7 *Co.* 37.

[The crown, or its grantee, on forfeiture takes the estate, subject to all charges, binding the party, though voluntary, if no fraud; but not subject to debts at large; and has the same equity to be relieved against a conveyance, as the party had for fraud on him. *Duke of Bedford v. Coke*, *H.* 1750, 2 *Vesey*, 116.]

(D 61.) *Derelict lands. What belong to the king.*] So, land, derelict by the sea, belongs to the king by his prerogative; for when the dominion and soil of the *British* sea belong to him, the derelict land, by consequence, shall be his. *Cal.* 25.

So, an island which rises in the sea. *Cal.* 22.

So, where a large tract of land is derelict suddenly; though the lord of the manor claims where there is a gradual accession to land adjacent. 2 *Rol.* 170. l. 1.

So, the king may grant derelict lands to another.

But, if he grants *omne solum*, &c. *tali marisco adjacen. modo inundat., quod ad aliquod tempus impofterum recuperat. foret per relictionem maris, vel aliter*, it does not pass lands which afterwards became derelict. *R.* 2 *Lev.* 171. *Ray.* 241.

So, if a wharf be erected under low-water mark, it belongs to the king. *Al.* 11.

Or, between high and low-water mark. *Dub. Al.* 11.

(D 62.) *What not.*] But, if the sea overflows the land of any person, and after forty years flows back again, the owner shall have the land, and not the king. 2 *Rol.* 168. l. 47. So,

So, by prescription the lord of a manor, adjacent to the sea, may claim lands derelict by gradual decrease, in respect of his loss when the sea flows upon his land. *Cal.* 27. 2 *Rol.* 168. l. 50. 169. l. 40. 50.

So, the soil between the ebbing and flowing of the sea may be parcel of a manor. *R.* 2 *Rol.* 170. l. 5.

(D 63.) *Possessions of the crown.*] All the lands in the kingdom are holden *mediate vel immediate* of the king, though the king holds of no one. *Co. L.* 1. *Vide Tenure* (A—B).

So, many lands and tenements are now *demesnes* in the hands of the king. *Mad.* 202. *Vide Antient Demesne.*

Other lands and tenements are demised by the king in fee-farm, which rents belong to the king. *Vide Rent*, (C 3.)

So, the king may have an inheritance, which he may grant in possession, or reversion; as an office, &c.: or in possession only; as a nomination to a corody, benefice, &c.: or which he may grant, or hold in his own occupation; as lands, &c. *R.* 8 *Co.* 55.

(D 64.) *The king seised jure coronæ.*] All lands and tenements, which the king has, belong to him in right of his crown, and are called *sacra patrimonialia*, or *dominica coronæ*. *Co. L.* 1. b.

Though they were lands and tenements of which he was seised in his private capacity before the descent of the crown to him. *Per Holt*, *Skin.* 603. *Pl. Com.* 213. b.

Or, which descended to him as heir to his mother; as the duchy of Lancaster. *Pl. Com.* 214.

So, if a statute gives to the king, or vests in him, his heirs and successors, any lands, without saying, *as parcel of his crown*, or to such effect; yet he has them as king *in jure coronæ*. *R.* *Pl. Com.* 105. a.

(D 65.) *Lands concealed.*] So, if lands belong to the king by attainder, or other title, though they are concealed for a long time, and not in the king's possession, the king may grant them to another; for no time runs against the king.

But, nothing shall be said to be concealed land, which comes to the notice of the king by matter of record; as, if land be expressly found by office, to have come to the king; or, be granted or surrendered to the king. *R.* *Cro. El.* 508.

(D 66.) *How the king may be entitled. By matter of record.*] In all cases where the king is entitled to an inheritance or freehold, he shall be entitled by matter of record, or by matter in deed found by office upon oath, or by matter in deed without office. 4 *Co.* 54. b.

If the king be entitled by matter of record, it shall be by conveyance upon record, by judgment, or by office. 4 *Co.* 54. b.

The king may take by conveyance by fine, or deed enrolled. 4 *Co.* 54. b. *Godb.* 441.

And it is sufficient that the deed be delivered to the officer in court, to be recorded, though it be not enrolled; for the indorsement by the officer, *that A. came on such a day, &c. and delivered the deed in court to the use of the king*, is sufficient. *R.* *Yel.* 30. But where *A.* leased

to the king, and acknowledged it before commissioners, with a prayer that it be enrolled, which is indorsed; if the deed be not enrolled, it is void. *R. Lane, 31. 35. 60. Vide patent (E).*

So, the king cannot take a chattel real, as a lease, &c. but by deed enrolled upon record. *R. Lane, 31. 35. 60.*

And the enrolment ought to be in the life of the lessor and lessee. *R. Lane, 61.*

So, the king will be entitled by a judgment, whereby a man is attainted for treason or felony; for the attainder appears by the record. (4 Co. 57. b.)

But a deed, whereby land is conveyed to the king, put into court, without more, is not sufficient. *Yel. 30. Cont. Mo. 676. Vide Patent (E).*

So, the king may take by devise, though not of record. *Mo. 103.*

So, a confirmation by a dean and chapter, to a grant of a bishop to the king, does not need enrolment. *Lane, 62.*

(D 67.) *By office. When necessary.*] So, in all cases, where a subject shall not have possession, in deed or in law, without entry, the king will not be entitled without office found, or other matter of record. *Stamf. Prær. R. 55. b.*

As, if the king's tenant aliens in mortmain, or without licence, the king's title must be found by office. *Stamf. Prær. 55. b.*

If the king claims upon a forfeiture. *Semb. Sav. 1. R. Cro. Car. 173. Jon. 78. 217.*

Or, a condition broken. *Stamf. Prær. 55. b. Sav. 70. 2 Rol. 215. l. 15.*

So, if the king claims the lands of an idiot, lunatic, &c. the person ought to be found an idiot, &c. by office. *Stamf. Prær. 55. b.*

[The court shall not grant a *melius inquirendum*, unless on pregnant matter, that the finding of the former commission was mistaken. *Knight v. Dupleffis, T. 1754, 2 Vezey, 555.*]

[The finding on a commission in another county, (especially if corroborated by evidence of witnesses,) is such pregnant matter. *Ibid.*]

So, if he claims the year, day, and waste of a felon attainted. *Stamf. Prær. 55. b.*

If he claims the temporalities of a bishop, for a contempt. *Ibid.*

So, if he claims a freehold or inheritance as forfeited for a contempt. *Sav. 8.*

But where an office does not give a title, but is found for the king's information of his title; after office found, the king shall avoid all mesne acts; for it relates to the commencement of the title in the king. *R. 2 Cro. 82.*

[Notice of issuing a commission for an inquest of office, to inquire whether lands are not escheated, shall not always be given, but on circumstances the court will grant it. *Rex v. Daly, T. 1749, in Sc. 1 Vezey, 269.*]

(D 68.) *When it is sufficient, without seizure, or not.*] If the king's title be found to lands and tenements, the king shall be in possession immediately by the office, without seizure. *9 Co. 95. b.* If the possession was vacant. *Stamf. Prær. 54. b. 4 Co. 58. a.*

So, if it be found to a local office, or of which continual profit may be taken. *9 Co. 95. b.*

So,

So, in all cases, where at the time of the office the possession was vacant. *Stamf. Prær.* 54. b. 4 Co. 58. a.

But if, the king's title be found by office to an incorporeal inheritance (as an advowson, &c.), the king shall not be in possession before seisure; for if the king, after office, presents, the defendant, in a *quare impedit*, may traverse the king's title, without traversing the office. 9 Co. 96. a. *Stamf. Prær.* R. 54. b.

So, if any other, except him in whose right the king claims, be in possession at the time of the office found, the king shall not be in actual possession till seisure. *Stamf. Prær.* 54. b. 4 Co. 58. b.

(D 69.) *When, without a scire facias, or not.*] So, an office is sufficient for the king, without a *scire facias* against the party, where a common person may enter, or seise, without an action. 9 Co. 96. b.

As, if a cause of forfeiture of an office be found by office, the king may seise it, without a *scire facias*. R. 9 Co. 95, 96.

But where a common person cannot enter, or seise, without having an action, the king, after office, ought to have a *scire facias*; as, upon waste, *cessavit*, &c. 9 Co. 96. b. for the office entitles the king to an action only, not to entry. *Stamf. Prær.* 55. a.

So, if a grantee of the custody of a forest commits a forfeiture, by cutting down wood, &c. which is found by office; there ought to be a *scire facias*, to which the grantee may answer. R. Sav. 1.

So, if the king's title appears by two distinct records, the king shall not be in possession before a *scire facias*, though a common person in such case might enter without action, except in special cases; as if an office finds that the manor of D. is held of the king, and it appears by a fine, that the manor of D. is aliened in *mortmain*, the king ought to have a *scire facias*, before seisure; for it is possible that there are two manors of D. 9 Co. 96. a.

So, if the king does not seise within a year and a day, after office found, he ought to have a *scire facias* before seisure. *Stamf. Prær.* 54. b.

(D 70.) *When an office is not necessary.*] But if the king's title appears by other matter of record, an office is not necessary. *Stamf. Prær.* 56. a.

So, if a possession in law be cast upon the king, no office is necessary, but the king may seise without it; as, if the king has a title by descent, in remainder or reverter; for the freehold is cast upon the king by law. *Stamf. Prær.* R. 54. a. 4 Co. 58.

Or, is entitled by escheat. *Stamf. Prær.* R. 54. a. R. Sav. 7.

Or, by his feignory or prerogative; as by reason of wardship, *primer seisin*, &c. *Stamf. Prær.* R. 54. a.

So, if entitled to the temporalities of a bishop in the time of vacation. 9 Co. 95. b. *Stamf. Prær.* 54. a.

So, if an estate granted by the king determines by a condition broken, the king shall be seised, immediately before the breach found by office. 2 Rol. 184. l. 10. Sav. 70. where the breach is apparent upon record. 2 Rol. 215. l. 5. 20.

As, if the king leased upon condition, that if the rent be not paid at the *Exchequer* such a day, it shall be void, &c. The non-payment appears upon record. *Dub.* 2 Rol. 216. l. 5.

Though

Though the breach be by matter *in pais*; as waste, non-payment of rent, &c. 2 *Rol.* 184. l. 10. 15.

So, if an estate be granted to *A.* for life, remainder to the king, upon condition to be void upon tender of money to *A.*; by a tender, the remainder to the king will be divested without office. *R. Mo.* 546. *Vide post.* (D 89.)

So, where the king ought to have chattels, or profits of lands for a contempt, he may seise without office; as, upon an outlawry, the goods of a prior alien, &c. *R. Sav.* 8.

A presentation to a church, upon an avoidance by simony, or otherwise. 2 *Vent.* 270.

A nomination to an office, void by the *st.* 5 & 6 *Ed.* 6. 16. by sale of the office, &c. *R.* 2 *Vent.* 270.

So, by the *st.* 33 *H.* 8. 20. the king shall be in actual possession of all lands, &c. of any attainted of high treason, without office. *Jon.* 72.

But though the king be seised for a condition broken, which determines the estate, he cannot grant it to another, till the breach is found by office; as if the king leases, rendring rent, upon condition to be void for non-payment, he shall not lease to another till office found, that the rent was not paid. *R. Sav.* 70.

(D 71.) *Intrusion upon the king. What shall be.*] If the king be seised of lands or tenements by matter of record, he cannot be disseised or ejected; but if any one enters, he will be an intruder upon the king's possession. *Stamf. Prær. R.* 56. *b.*

And therefore, if a man enters upon the king's *demesnes*, and takes the profits, it will be intrusion; for, as the king takes only by matter of record, he cannot be ousted of his possession, but by matter of record. *Co. Lit.* 277. *a.*

So, if he enters upon a possession cast upon the king by descent, escheat, &c. before entry by the king. *R. Sav.* 7. 4 *Co.* 58.

So, if an heir, in ward of the king, enters after his full age, before livery. *R.* 2 *And.* 210.

Or, if the heir of the king's tenant enters, after finding for the king, before livery. *Sav.* 55.

So, if a man enters upon a farmer or committee of the king, it will be intrusion, and does not oust the king. *Stamf. Prær. R.* 56. *b.* *Fitz. Prær.* 12.

So, if the king's tenant holds over his term. *Hard.* 25. 2 *Rol.* 215. l. 10. *Vide Estates,* (I 2.)

So, if a man ousts a lessee for years of the king, an information of intrusion lies; for a lessor shall have an assise, if his lessee for years be ousted. *Sav.* 69.

An intruder upon the king does not gain any freehold in the land. *Fitz. Prær.* 12.

By the *stat. Prær. R.* 13. *si hæres ingreditur*, (viz. after office found upon the death of his ancestor tenant *in capite*), *nullum accrescit ei liberum tenementum; et si obierit, &c. Uxor ejus non habebit dotem, et quod vir suus intravit per intrusionem, &c.* *Stamf. Prær.* 40.

And therefore, where any intrudes or enters upon the king's possession the king shall not be put to assise or ejectment. *Stamf. Prær.* 56. *b.* So,

So, if he enters upon the king's committee or farmer. *Stamf. Prær. 56. b. Vide supra et infra.*

So, an intruder cannot make a lease to maintain an ejectment. *Al. 11. Vide infra.*

Neither can he maintain trespass, though he be possessed several years; for the trespasser shall answer to the king for his wrong, and he shall not be punished twice. *Pl. Com. 545. b. Cont. All. 11. Per three J. acc. others cont. Godb. 133.*

So, he cannot make a feoffment. *R. 2 And. 210. Sav. 32. 55.*

So, a fine by him will be void. *2 And. 210. Sav. 55.*

But if the heir of tenant *in capite* enters before office found, he has seisin. *Stamf. Prær. 40. b. Sav. 55.*

So, if a stranger enters by title, or without title, upon land in ward of the king, before office found for the king. *Stamf. Prær. 57. a.*

So, if tenant in tail, remainder to *A.* in tail, remainder to the right heirs of tenant in tail, makes a feoffment, it will be a discontinuance; though as to the reversion he had not paid *primer seisin* to the king. *R. 2 And. 210.*

So, if tenant in tail, remainder for years to *A.*, remainder to tenant in tail in fee, and *A.* assigns to the king, and then tenant in tail makes a feoffment, it will be a discontinuance. *2 And. 210.*

So, an heir may make a lease, bargain, and sale, &c. which enure as a contract. *Sav. 55.*

So, if *A.* enters upon the king's farmer, and leases to *B.*, he shall maintain an ejectment; for *A.* gained the estate of the farmer. *R. 3 Leo. 206. Vide supra.*

(D 72.) *How he shall be redressed. By information of intrusion.]* If a man intrudes upon the king's lands, an information for the intrusion lies in the name of the attorney-general. *Pl. Com. 547. 1 Co. 16. b. Co. Entr. 372. 376. F. N. B. 90. I.*

And it is sufficient, though it be general, that the king was seised of certain lands, without describing the particular species, or quantity; for it is in the nature of a trespass, *quare clausum fregit*. *Sav. 48.*

If an intruder cuts the trees, or takes the goods of the king, an information lies also against his executor. *R. Sav. 40.*

So, the king may have trespass, *quare clausum fregit, herb. depast. fuit arbores succidit, &c.* *F. N. B. 90. I.*

(D 73.) *What process upon it.]* The process upon an information shall be a *venire distringas*, and afterwards a writ out of *Chancery*, directed to the treasurer and barons. *4 Inst. 110. 2.* Whether this extends to process upon an information? *Vide Information, (D 1.)*

But by the *st. 21 Jac. 14.* if an information of intrusion lies, a *scire facias* shall not be brought to put the defendant to plead specially.

(D 74.) *Plea to such an information.]* At common law, upon an information of intrusion, the king, by his prerogative, might put the defendant upon shewing his title specially. *Dy. 238. b. Vide post.*

(D 85.)

And if he pleaded *not guilty*, he should be immediately put out of his

his possession; for a title for the king appears upon the information, if no title appears upon record for the defendant. *4 Inst.* 116.

And if the defendant shews an insufficient title in form, the attorney-general may demur. *Dy.* 238. *b.*

A plea of a special title in the defendant concludes with a traverse of the intrusion. *Pl. Com.* 548.

But the defendant might plead *non intrusit*, generally. *Semb. Sav.* 4.

Or, *not guilty.* *Sav.* 66.

And by the *st.* 21 *Jac.* 14. if the king, or those claiming under him, or those under whose title the king claims, have not been in possession, or received the profits within twenty years, the defendant may plead the general issue, and shall not be ousted of his possession, till the title be found or adjudged for the king.

So, if he pleads so much as shews that the defendant has title to the possession, it is sufficient; for an information of intrusion is in the nature of trespass; as if the defendant, by her plea, shews that she has a jointure of a third part, without answering to the residue; for by that she has the possession of the whole in common with the king. *Semb. Mo.* 370. 376.

So, a terre-tenant may plead payment, or matter which goes in discharge of the land, without shewing a title. *Hard.* 230.

If in an information for intrusion the defendant pleads his title, he ought to shew a good title. *Mo.* 385.

And therefore, if intrusion be alleged in *M. Marsh*, it is not sufficient to shew a grant by patent of *S. Marsh*, without an averment *quæ est eadem.* *Sav.* 48.

And if he pleads such grant, and concludes with a traverse, *absque hoc* that he is guilty of the land in the information, it is bad. *R. Sav.* 34.

If he pleads that *A.* was seised, and died seised, and the land descended to the defendant; for a descent does not bind the king. *R. Sav.* 45.

If he pleads that an abbot and convent, seised in fee, leased for years to *A.*, which estate the defendant has; for he cannot make title to a term by a *quæ estate.* *Semb. Dy.* 238. *b.*

But if the title shewn by the defendant be defective in form, and the attorney-general does not demur, but joins issue upon a fact alleged, which is found against him, he shall not afterwards take advantage of the defect. *Dy.* 238. *b.*

[Defendant cannot plead several matters by *4 Ann. c.* 16. for amendment of the law. *Attorney-General v. Allgood*, *P.* 16 *Geo.* 2. *Parker*, 1.]

(D 75.) *Replication.*] If the plea alleges several facts, the king, by his prerogative, may traverse them all, though a common person ought to traverse but one. *Sav.* 19.

If the plea alleges a title, which avoids the possession in the king supposed by the information, the king need not maintain the information, but may traverse the title alleged by the plea. *R. Sav.* 61. *Vide post.* (D 85.)

But it is sufficient, if the king, by his replication, traverses so much of the title as encounters the information, without answering

to the whole title alleged by the defendant; as, if an information be for intrusion in the moiety of a manor, the defendant says, *A.* was seised of the whole, and died seised, by which there was a descent to the defendant; it is sufficient to traverse, *absque hoc* that he died seised of such moiety. *R. Sav.* 61.

(D 76.) *Verdict.*] If intrusion be alleged in twenty acres, and the verdict finds the defendant guilty only in twelve acres, and in the residue not guilty, judgment shall be for so much, and he who pursues for the king shall take possession at his peril. *R. Sav.* 28.

If a declaration be for intrusion in twenty acres in *A.* and twenty acres in *B.*, and the defendant is found guilty of ten acres, without saying in which vill, yet it shall be good. *Dub. Sav.* 35.

If there be a verdict for the king, judgment shall be for the king, though the defendant dies. *Sav.* 57.

(D 77.) *Judgment and execution.*] The judgment in an information for intrusion for the king shall be, that the defendant *amoveatur de possessione*. *Sav.* 35. The judgment shall be, *quod capiatur pro fine*, and thereupon there shall be an injunction for the possession; for the king is supposed in possession. *R. Hard.* 460. 462.

If the information charges intrusion, and that he cut trees, &c. the judgment shall be also for damages. *Q. Sav.* 49.

After judgment, execution shall be sometimes by injunction. *Sav.* 35. *Hard.* 460.

Or, by *amoveas manum*. *Sav.* 35. *Hard.* 462.

And thereupon every party to the information, or claiming under him, shall be removed from the possession. *Hard.* 460. 462.

But a stranger to the information shall not be debarred of his entry; for on an information no judgment of seisin is given, nor does an *habere facias seisinam* go. *R. Hard.* 460. 462.

(D 78.) *Remedy against the king.* By petition.] The king cannot be sued by writ, for he cannot command himself. *4 Co.* 55. *a.* *Vide Action*, (C 1.)

And therefore, where the king is seised by matter of record, or by matter of fact found by office upon record, he who has right shall be, by the common law, put to his petition of right, in the nature of a real action, to be restored to his inheritance, or freehold. *R.* *4 Co.* 55. *a.* *R. per all the J.* *4 H.* 7. 7. *b.*

So, in all cases where the king seises the lands or goods of a subject, without due order of law. *Stamf. Prer.* 72. *b.*

So, if the king enters into the land of another, without title or office found. *Stamf. Prer.* 74. *a. b.*

Or, does not pay an annuity granted by him, or issuing out of land in his hands. *Ld. Somers's Arg.* 81.

Or, does not pay a debt, wages, &c. *Ld. Somers's Arg.* 85.

And in all cases where a traverse, or *monstrance de droit*, does not lie, suit ought to be to the king by petition; as, if the king be entitled by double matter of record. *Stamf. Prer.* 74. *a.* *R.* 3 *Leo.* 15. Both records being removed into the same court. *Lane,* 58.

If the king be entitled by a record not traversable; as, by a recovery in the king's court, by assent without title. *Stamf. Prer.* 74. *a.*

By

By an erroneous judgment; for error shall not be allowed, without a petition. *Stamf. Prær. 74. a.*

If a stranger brings a *præcipe in capite*, against the tenant of *B.*, and recovers by default, though *B.* is not thereby out of possession of his feignory, yet if the recoveror dies, his heir within age, and the king seises the ward; *B.* ought to sue for the ward by petition. *Ibid.*

So, in all cases where a man has a right, and in the case of a common person, his entry would be tolled, he ought to sue to the king by petition; as, if *A.* disseises *B.* and dies seised without claim made, and then it is found by office that *A.* held of the king *in capite*; *B.* has not any remedy but by petition. *Stamf. Prær. 74. b.*

So, in all cases where the entry would be tolled, if the land was in the hand of a common person. *Ibid.*

Or, where the party controverts the king's title. *Per Holt, Skin. 608.*

But where the king seises lands, or enters without title or matter of record, if he who has right be permitted to enter, his entry is not unlawful, nor shall it be an intrusion upon the king. *Ibid.*

So, if the king in such case grants to another, he may enter upon the patentee without petition. *Ibid.*

So, though an office finds a title in the king, and a grant, if it appears by the same office that the fact is mistaken. *R. Dy. 101. a.*

So, where an estate is forfeited by attainder, &c. none can sue by petition before office found; for till office the estate is not vested in the king. *Jon. 78.*

If *A.* be attainted in *B. R.*, and it be found by inquisition in the *Exchequer* that he was seised of the manor of *D.*, this will not be double matter of record, the attainder not being in this court, to entitle the king, that a suit by the owner ought to be by petition. *R. Lane, 58.*

(D 79.) *To whom the petition shall be.*] Suit shall be to the king by petition, for goods as well as for lands. *Stamf. Prær. 72. b. 75. b.*

So, it shall be for land, where the king is seised *en autre droit*. *Stamf. Prær. 75. b.*

But suit by petition shall not be to any other but the king. *Ibid.*

Not to the queen; for she has no such prerogative. *Ibid.*

Nor, to the prince. *Ibid.*

(D 80.) *How the proceeding upon it shall be.*] A suit by petition may be to the king in parliament, or in *Chancery*, or other court.

If it be in parliament, it may be established by act of parliament, or pursued as in other cases. *Stamf. Prær. 72. b.*

Upon petition out of parliament, or there (if it be not pursued as a statute) it shall be indorsed by the king, *soit droit fait*, and then delivered to the chancellor. *Stamf. Prær. 73. a. Mo. 639.*

Or, a petition may have a special conclusion, that the king command his justices of *B. R.* or *C. B.* And if it be indorsed accordingly, it shall be pursued there. *Stamf. Prær. 73. a.*

If a petition be delivered to the chancellor, there ought to be an inquisition which finds the right of the party, before the petition be depending, or there be any proceeding upon it. *Stamf. Prær. 72. b.* Except where the attorney-general confesses the suggestion. *Skin. 608.*

Id. Somers's Arg. 41.

If the inquest finds for the king, there ought to be another inquisition, till a title be found for the party. *Stamf. Prær. 73. a.*

If a petition be indorsed to *B. R.* or *C. B.*, it may be proceeded upon without an inquisition; for the indorsement warrants it. *Stamf. Prær. 73. b.*

So, where no office is found to entitle the king, the party may pursue a petition, without an inquisition for him. *R. Mo. 639.*

After a commission, whereon a title is found for the party, before he can interplead with the king, there ought to be a writ to inquire of the king's title. *Stamf. Prær. 73. b.*

And this, in all cases where a petition was in parliament, or elsewhere, where land was in the king's hand, or granted to another; for after issue found, upon petition, for the party, the king shall be concluded for ever. *Ibid.*

If the land be granted to another, there shall be a *scire facias* also against the patentee. *Ibid.*

So, where a petition disaffirms the king's possession, there ought to be four writs of search to the treasurer and chamberlains of the *Exchequer*. *Mo. 639.*

But writs of search are not necessary, where the petition affirms the king's possession; as, upon a petition of right of dower. *R. Mo. 639.*

(D 81.) *By monstiance de droit.* When it lies by the common law.] By the common law, a man might sue to the king by *monstiance de droit*, if his title had appeared by the same record by which the king was entitled; as, if the king was entitled by an alienation in *mortmain*, purchase from his villein, from an *alienee*, escheat, and the same office which found for the king, found also the title or interest of the party. *R. 4 Co. 55. a. Per Holt, Skin. 609.*

So, if his title appear by another record of as high a nature; as, if a conveyance be to the king, upon condition to be void, if a fine be levied, or a recognizance given, or other matter performed, which must be upon record; if he who made the conveyance levied the fine, gave the recognizance, &c. he may have a *monstiance de droit* by the common law; for the performance appears by the record as high as the conveyance. *4 Co. 55. b. R. 4 H. 7. 7. b.*

So, though the performance of the condition be not upon record, if it be afterwards found by office. *4 Co. 55. b.*

So, if the title of the party be not found by the same or another record, whereupon he sues to the king by petition, and an inquisition be granted upon the petition, finding his right; he afterwards may have a *monstiance de droit* by the common law. *4 Co. 57. b.*

But, if the title of the party does not appear by the record, which finds a title in the king, nor by any other record as high, he cannot have a *monstiance de droit* by the common law, but ought to sue to the king by petition. *4 Co. 55. b. Lord Somers's Arg. 75.*

Though it appears by the return of the sheriff, mayor, &c. to a *diem clausit extremum*, or other writ; for the return, though filed upon record, is not so high as an office found *per sacramenta proborum hominum*. *4 Co. 55. b.*

So, if the title of the party is found by a ministerial record, as an inquest before an escheator, &c. when the king's title appears by a judicial record, as an attainder, judgment, &c. which is higher. *4 Co. 56. a.*

(D 82.)

(D 82.) *When, by statute.*] So, now by the *st.* 36 *Ed.* 3. 13. lands being seised by inquest of office before the escheator, any who will claim the lands seised shall be heard to traverse the office, or otherwise shall have a *monstrance de droit*.

And therefore, when an office is found, which is traversable by that statute, the party may have a *monstrance de droit*. 4 *Co.* 59. a.

Though he be not put out of possession by the office. *Ibid.*

Though the king be entitled by matter in pais, found by record; as, by purchase of his villein, alienation in mortmain, &c. *Ibid.*

So, if the king be entitled by office, or matter of record, which is traversable, but, being true, cannot be traversed, the party may have a *monstrance de droit*. *Stamf. Prær.* 71.

As, if it be found that the king's tenant died seised, and the land descended to his heir; where A. recovered against him before his death, but he died before execution. *Stamf. Prær.* 71. a.

Or, the tenant disseised me. *Stamf. Prær.* 71. a. 4 *Co.* 54. b.

But, where the king was entitled by double matter of record, the party could not have a *monstrance de droit*, till it was given by the *st.* 2 & 3 *Ed.* 6. 8. *Stamf. Prær.* 71. b. Or the title of the party be found by one of the records, or he pleads to one, *nul tiel record*. *Stamf. Prær.* 72. a.

In all cases where the party may have a traverse, or *monstrance de droit*, he may enter, or have an action, if the king grants over the land. 4 *Co.* 59. b.

A *monstrance de droit* lies only in Chancery, or the Exchequer, except in special cases. *Per Holt, Skin.* 609.

The *monstrance de droit* recites the inquisition found for the king, and then shews the right of the party, and prays an *amoveas manum*. *Co. Ent.* 402.

If the attorney-general confesses the title of the party, judgment shall be, *quod manus Domini regis amoveantur*. 4 *Co.* 57. b.

If he replies to the title of the party, and afterwards confesses it. *Co. Ent.* 404. b.

Or, if found for the party by verdict, or upon demurrer. 4 *Co.* 57. b. *Co. Ent.* 406. b.

So, there shall be judgment also for the *mesne* issues and profits. *Stamf. Prær.* 71. a.

If the plaintiff, in a *monstrance de droit*, has no title, he shall be nonsuited. *Sal.* 448.

And he cannot have judgment, though the king has no title, if he himself has no right. *Ibid.*

If there be a *monstrance de droit*, upon an inquisition in Chancery, and upon that the attorney-general demurs there, it shall be delivered into B. R. by the hands of the chancellor, and there determined. *Sal.* 448.

But if the right of the plaintiff in a *monstrance de droit* appears, or may be collected by the inquisition, or the inquisition be falsified by it, judgment shall be for the plaintiff, and the inquisition, as to him, shall be avoided. *R. Sal.* 448.

(D 83.) *Traverse of office. When it lies by the common law.*] By the common law, where the king was entitled by office, though it was false, the party could not have a traverse to the office. 4 *Co.* 56. a.

Nor, could avoid it without petition. *Stamf. Prær. 60. b. 13 Ed. 4. 8. a. Lord Somers's Arg. 77.*

Nor, where the king was entitled by any matter of record, judicial or ministerial, conveyance of record, or matter of fact found by office of record. *R. 4 Co. 55. a.*

Though the office concerned only a chattel real. *4 Co. 56. a. Vide infra.*

But, where the office did not give a seisin or possession to the king, but only entitled him to an action for recovery of the land; in such action the party might traverse the office by the common law. *4 Co. 56. b.*

As, if an office finds that the king's tenant has ceased for two years, or done waste; or made a feoffment by collusion, &c. whereby the king is entitled only to his action of *scire facias* against his tenant, in which the tenant may traverse the *cesser*, waste, collusion, &c. *Ibid.*

So, by the common law, an office, or inquisition for goods or chattels personal might be traversed. *Stamf. Prær. 60. a. 13 Ed. 4. 8. a. Vide supra.*

As, if *A.* be attained for treason, or felony, or outlawed in debt, trespass, &c. and an inquisition finds that he had such goods at the time of the felony or outlawry; a stranger, who has the property, may traverse it. *R. 4 Ed. 4. 24. a.*

[If a term for years is found and sold on an inquisition on an outlawry, a mortgagee, not in possession, shall be allowed to plead to the inquisition. *Semb. Rex v. Blunt, P. 1722, Bunb. 104.*]

[On outlawry, inquisition thereon returned, *levari* issued, and money levied, he who has a statute-merchant, and is in possession of the land, may, on motion, have time to plead to outlawry and inquisition; and, on giving security, have the money in the sheriff's hands repaid him. *Rex v. Tollet, H. 1722, Bunb. 123.*]

[If on inquisition a man is found possessed of a term in right of his wife, and after his death it is sold on *venditioni exponas*, the widow shall be permitted to plead to the inquisition, though she has defended an ejectment brought by the purchaser, and filed a bill in Chancery. *Watts v. Robinson.*]

So, offices for information only are traversable; as all offices under the *Exchequer* seal. *Sav. 130.*

But, where by office, or statute without office, a particular estate is vested in the king, he, in the reversion or remainder dependant upon the estate vested, may enter upon the king, (his estate being determined,) without traverse, or *amoveas manum*. *R. Sal. 469.*

So, if it be found by inquisition, that *A.*, outlawed in a personal action, was seised of lands, which *B.* claims, and the escheator takes the profits by this false office: *B.* may disturb him, without a traverse. *Stamf. Prær. 67.*

[When an inquisition is traversed, security is taken to the value of two years profits of the lands. *Rex v. Barlow, in St. T. 1718, Bunb. 25.*]

(D 84.) *When, by statute.*] And now by the *st. 34 Ed. 3. 14.* where lands are seised upon an office of the escheator, finding that the king's tenant aliened without leave, or held by knight's service, and died, his heir within age, he shall be received to traverse in Chancery, that the land was not seisable.
But

But this statute extends only to offices found *virtute brevis aut commissionis*, not *virtute officii*. *Stamf. Prær. 60. a. 4 Co. 57. a.*

And if the traverse is found for the party, he shall not have judgment till a writ of *procedendo ad judicium* be awarded. *Ibid.*

By the *st. 36 Ed. 3. 13.* if land be seised by an office before the escheator returned into *Chancery*, a man, who challenges the lands seised, shall be heard without delay to traverse the office, &c. and thereupon there shall be a final discussion, without waiting for any other commandment.

And the last statute allows a traverse to all offices found before the escheator. *Stamf. Prær. 61. a. 4 Co. 57. b.*

And to offices found before commissioners, as well as before the escheator. *Stamf. Prær. 61.*

And by the *st. 8 H. 6. 16.* it is extended to all aggrieved by the inquest, though not put out of possession by the escheator.

And therefore, in all cases, where the king is entitled by office, the party-grieved may traverse the point, by which the king is entitled; as, if an office finds a tenure *in capite*, the tenant may traverse the tenure. *Stamf. Prær. 62. a.*

So, he who has title, if he shews his title, may traverse before his title be found by record. *Stamf. Prær. 63. b.*

So, by the *st. 2 & 3 Ed. 6. 8.* if any be untruly found heir, lunatic, idiot, or dead, the party grieved may traverse the office or inquisition.

Or, any be entitled to an estate of freehold in lands, found by office or inquisition to belong to a person attainted of treason, felony, or *premunire*; though the king be entitled by double matter of record.

But those statutes do not allow a traverse, except where the king is entitled by the office; as, if *A.* be attainted for high treason by verdict or act of parliament, &c. and it is found by office, that at the time of the treason he was seised of such lands, which *B.* claims as his own; *B.* cannot traverse the office, without saying, that there is no such record of attainder. *R. 4 Ed. 4. 21. 29. a. Stamf. Prær. 61. b.* But this was remedied by the *st. 2 & 3 Ed. 6. 8.*

So, a man shall not be allowed to traverse the office where he cannot be aided by an office to the contrary; as, if an office finds a tenure from the king, and that the tenant is dead, and *A.* is his heir; *A.* shall not traverse the office, that *he is not heir*, if the tenure be true; for if another office should find him *not heir*, it does not avail; for the better office shall be taken for the king. *Stamf. Prær. 61. b.*

So, if the tenant dies seised of lands in divers counties, and *A.* be found his heir of full age, by office in one county, and within age, by office in another county; he cannot traverse that he is not within age. *Stamf. Prær. 62. a.*

So, none, who has not title, can traverse an office which finds a title in the king; as, if an office finds a tenure *in capite*, and that the heir is within age; the lord, who claims a tenure in socage, shall not traverse the tenure *in capite*; for he has no title to the wardship. *Stamf. Prær. 63. a.*

Nor, a feoffee, without making to himself a title by feoffment, licence, alienation, &c. *Ibid.*

And it is not sufficient to shew a title by estoppel; as, a fine, &c.; for the king shall not be estopped. *Stamf. Prær. 64. a.*

So, it is not sufficient, if he does not traverse all titles, which the king had at the time of the traverse. *Stamf. Prær. 64. b.*

So, a termor for years cannot traverse an office, which finds the inheritance or freehold in the king. *Stamf. Prær. 62. b. Semb. cont. 4 Co. 58. a.*

But now by the *st. 2 & 3 Ed. 6. 8.* a lessee, copyholder, or any who has a rent, or other profit *apprendre* out of lands, &c. in an inquisition, where the king is entitled, shall hold and enjoy his term or interest, as if no inquisition had been found, or his lease or interest had been found by such office.

And it is sufficient for the lessee, &c. to shew his interest, &c. without alleging seisin in another under whom he claims; for the title to the inheritance is not traversable, where the lessee, &c. only supplies the defect of the office or inquisition.

[To an inquisition on an extent on an outlawry, the defendant, as terre-tenant, may plead that the party outlawed is dead, without setting forth a special title. *Rex v. Barnfield, H. 1721, Bunb. 102.*]

[A writ of *diem clausit extremum* shall not be set aside on motion, for defendant may plead to the inquisition. *Rex v. Michener, M. 1722, Bunb. 118.*]

[The traversor of an inquisition of lunacy found for the king, shall be considered as a defendant, and therefore the record shall be made up, and carried down to trial by the prosecutor. *Rex v. Roberts, P. 17 G. 2. Str. 1208.*]

Yet, the heir, &c. shall not traverse the office, without an office which finds him heir. *R. 7 Co. 45. 2 Cro. 186. Vide ante, (D 82.)*

(D 85.) *Remedy for the king. What privileges the king shall have in suits.* The king, by his prerogative, may sue in what court he pleases. *Sav. 9, 10. F. N. B. 7. B. 32. E.*

[When the revenue is concerned in the event of a cause, it shall be removed from any other court where action brought, into the office of pleas in *Scac.* *Lamb v. Gunman, T. 24 & 25 G. 2. Parker, 143.*]

If the defendant dies, the action by the king does not abate. *2 Cro. 481.*

So, the king may lay his action in what county he pleases, in any personal action. *1 Vent. 17. 1 Sid. 412. Vide Dett, (G 12.)*

So, for lands in any county, he may lay his action in the *Exchequer*, and try it in that court. *Sav. 10.*

So, he may have a bill for taking of goods in *Middlesex*, and intruding into lands in the county of *N.*; for, upon *not guilty*, a *venire facias* goes to each county. *R. 4 Leo. 26.*

[Information in *Scac.* for loading woollen yarn for exportation, may be laid in any county; the offence is transitory, and there are no negative words in the *statute* (12 C. 2. c. 32.). *Attorney-General v. Browse, T. 1727, Bunb. 236. Attorney-General v. Hines, H. 31 G. 2. Parker, 182.*]

[If on a commission to inquire whether *A.* is an alien, it is found against the king, he cannot have another new commission into the same county, but he may have a *melius inquirendum*; and if that also is found against the king, it is conclusive; if for him, *A.* may traverse. *Ex parte Dupleffis, T. 1754. 2 Vesey, 438.*]

So,

So, the king may amend his declaration in the same term. *Vau. 65.* But not in another term. *R. 13 Ed. 4. 8. a.*

So, in an information of intrusion; if the defendant makes a special title, he ought not to traverse the intrusion, but the matter, upon which by the information he is supposed to be an intruder. *Per Manwood Ch. Bar. Shute cont. Sav. 2. Vide ante, (D 74.)*

In an information in the *Exchequer* (if the king appears entitled by matter of record, *Vau. 64.*) if the defendant pleads in bar, and traverses the matter of the information, the king need not maintain his information, but may traverse the matter alleged by the plea. *2 Cro. 481. Sav. 64.*

So, in a traverse of an office, which finds a title to the king, the king may traverse the title of the party, or maintain the office, at his election. *Stamf. Prær. 65. a. Vau. 64.*

So, if the king has several titles traversed, he may maintain all, or only one, at his election. *Stamf. Prær. 65. a.*

So, the king may waive his replication in another term, when the defendant is ready to rejoin. *R. 2 Rol. 41.*

So, in an information the king may waive his demurrer to the defendant's plea, and reply to issue. *Cro. Car. 347. Vau. 65. Hard. 455. Pl. Com. 322. a.*

[If defendant pleads, and attorney-general does not reply or demur in reasonable time, the court may give judgment for defendant as if plea confessed; but attorney-general should first be attended. *Rex v. Musters, H. 18 G. 2. Parker, 50.*]

And the defendant cannot waive his plea, and plead the general issue, without the consent of the attorney-general. *Cro. Car. 347. 2 Rol. 41.*

[If on a *scire facias* out of the petty bag to repeal letters patent, one defendant has pleaded to issue, and as to the other demurrer was joined, the king may bring on either the trial or the demurrer first, as he pleases. *Rex v. Hare and Mann, H. 6 G. Str. 266.*]

So, after issue joined, the king may waive the issue, and demur. *Stamf. Prær. 65. b. In the same term. Vau. 65. Hard. 455. Pl. Com. 322. a.*

Or, take another issue in the same term, though not in another term. *Stamf. Prær. 65. b. Vau. 65. 13 Ed. 4. 8. a.*

But, if the king joins issue upon a traverse of his title, he cannot afterwards waive it, to traverse the title of the defendant. *Semb. Vau. 64. 1 Mod. 276. R. 13 Ed. 4. 8. a.*

So, in the *Exchequer*, no *nisi prius* shall be granted where the king is a party, where the attorney-general does not consent. *Sav. 2.*

So, the trial shall be at *nisi prius*, and not in *bank*, if the king by letter requires it. *Cro. Car. 349.*

Though it be upon an indictment removed by *certiorari*. *Cro. Car. 348.*

So, the king shall take advantage of an estoppel, though no party to the record; for he is always present. *Vide Estoppel (D).*

So, if a title appears upon record for the king, the court *ex officio* shall judge it for him. *Cro. Car. 590.*

So, if the attorney-general confesses the plea of the party, and thereupon he be discharged, where the plea is no bar in law, the king shall not be bound; for though a confession by the attorney-general

general in a matter of fact binds the king, it is not so in a matter of law. *Semb. Hard. 170.*

But after a *distringas*, and jury returned upon it, the attorney-general cannot at his pleasure stay trial. *Qu. 4 Leo. 32.*

Neither can he waive the issue after verdict. *Hard. 455.*

[Prisoner at the king's suit, brought up by *habeas corpus*, cannot be committed to the *Fleet* without consent of the crown, because the king may chuse to commit him to what prison he pleases.] *Barnes, 385. 388.*

(D 86.) *No time runs against the king.*] So, the king shall not be prejudiced by his neglect to pursue his right.

So, where the king is patron of a church, a lapse does not incur for not presenting within six months. *Vide Esglise, (H. 6. 9. 11, 12.)*

So, if the king's goods are wrecked, the lord shall not have them for the king's not proving his property within a year and a day; for he may do it at any time. *2 Inst. 168.*

If the king's debt be not recovered before another takes execution, the king shall not be prejudiced; for *nullum tempus occurrit regi.* *Hard. 25. Vide Dett, (G 8.)*

By *M. Ch. 9 H. 3. 29. nullus liber homo capiatur, imprisonetur, disseisietur de libero tenemento, libertatibus, liberis consuetudinibus suis, utlagetur, exuletur, aut aliquo modo destruat, nec super eum ibimus, aut mittimus nisi per judicium parium suorum, vel per legem terra.*

Nulli vendemus, nulli negabimus, aut differemus justitiam, aut rectum.

And therefore the lands or goods of none shall be seized by the king, except by course of law. *2 Inst. 46.*

[By *stat. 9 G. c. 3. 16.* the king shall not sue, &c. any person, &c. for any lands, &c. (except liberties and franchises) on any title which has not first accrued within sixty years before the commencement of such suit, unless he has been answered the rents within that time, or they have been in charge, or stood *insuper* of record, and the subject shall quietly enjoy against the king, and all claiming under him by patent, &c.

[This extends not to estates in reversion or remainder, or limited estates.]

[These lands shall be held on the usual tenures, &c.]

[Usual fee-farm rents confirmed.]

[Putting in charge, standing *insuper*, &c. good only when on verdict, demurrer, or hearing, the lands, &c. have been given, adjudged, or decreed to the king.]

(D 87.) *The revenue of the king; how disposed. The personal revenue.*] No officer, nor all together, can dispose of the king's treasure *ex officio.* *2 Rol. (180.) l. 35. 11 Co. 91. b. Lord Somers's Arg. 57.*

Though it be for the honour or profit of the king. *2 Rol. (180.) l. 35.*

So, the court, or barons of the *Exchequer*, cannot dispose of the king's treasure out of his *Exchequer* to a grantee of the king, by any judgment upon the exhibiting of a patent to them. *R. per Treby and Lord Chancellor Somers, 5 Mod. 46. 62. Cont. per Holt and other J. Skin. 611. Lord Somers's Arg. 128.*

So, no treasure can be disposed of, but by the great or privy seal. *Lord Somers's Arg. 56. Not.*

Not by warrant of the treasurer and under-treasurer. 11 Co. 91. Lord Somers's Arg. 58.

So, every one who receives money issuing out of the *Exchequer*, without due warrant, is accountable for it. *Mad.* 271. *Vide Dett*, (G 1.)

But, by the writ or warrant of the king, or the barons of the *Exchequer*, to a sheriff, &c. such payment may be directed out of the money in his hands, which, upon producing such warrant, shall be allowed upon his account. *Mad.* 248.

And upon such warrant the settled alms and liveries were usually paid. *Mad.* 248.

And frequently sums for the service or debts of the king. *Mad.* 250.

So, upon a bill of such expence made, &c. the Chancellor issues a writ of *allocate*. *Mad.* 271.

So, the king issued sometimes by way of prest, or imprest, out of the receipt of his *Exchequer*, &c. money for such a service; for which the receiver became accountable to the king. *Mad.* 266.

And such imprest was upon a writ or mandate of the king, under the great or privy seal, directed to the chief justicier and barons, or to the treasurer and chamberlains, and founded upon a bill or certificate of the *Exchequer*, or other matter of record. *Mad.* 268. (*Reg.* 192, 193.)

Or, by a *liberate* directed to the treasurer and chamberlains, commanding them *liberare de thesauro nostro* such a sum. *Mad.* 268. (*Reg.* 192, 193.)

And such *liberate* was *pro hac vice*, or for a payment *annuatim*, which is called a dormant or current *liberate*. *Ibid.*

(D 88.) *The lands and real revenue.*] The king may dispose of his lands and other real revenue of inheritance, by his patent, to others, when he pleases. *Pl. Com.* 213. b.

And not only lands, which he has by descent or purchase, but also which are settled upon him, his heirs and successors, by parliament. *R.* 5 *Mod.* 47. 55. *Skin.* 602. 605.

So, the customs, excise, &c. given to him and his heirs. 5 *Mod.* 56. *Skin.* 602.

So, the king may mortgage his lands.

And the mortgagee ought to demand the money at the day, at the receipt of the *Exchequer*; otherwise the king may re-enter. *R.* *Mo.* 556, 7.

So, the king may grant a rent-charge, or annual sum, to be paid out of his possessions or revenue. *Per Holt*, *Skin.* 607.

And if he grants an annuity, or annual payment of a sum, it does not charge his person, but his possessions. *Skin.* 607.

And such annuity or rent-charge is assignable to another, in part or in the whole. *Ibid.*

So, the king may convey lands, of which he is seised in right of the duchy of *Lancaster*, by feoffment, and there ought to be livery by attorney. *R.* 1 *Lev.* 29. Not when united to the crown. *Pl. Com.* 214. a.

But by the *st.* 1 *Ann.* 7. *f.* 5. all grants, &c. by the queen or her successors, after the 25th of *March* 1702, of any manors, lands, &c. (advowsons of churches and vicarages excepted,) shall be void, except made

made for a term of thirty-one years or under, or for three lives, or for a term determinable on one, two, or three lives, or in reversion, making up the term of thirty-one years, or three lives, &c. to commence from the date or making, subject to waste, and reserving the usual rent or more; or, if no rent before, reserving a rent not less than a third part of the clear yearly value, payable to the queen and her successors during the whole term.

Provided building leases may be for fifty years, or three lives, &c.

And the hereditary excise, revenue, of the post-office, first-fruits and tenths, fines for writs of covenant and entry at alienation office, post-fines, wine-licences, sheriffs' profers and compositions, and seizures for uncustomed and prohibited goods, shall not be alienable, but for the life of the king, who grants them.

[Stat. 17 G. 3. c. 17. directs *Enfield Chase* to be divided and inclosed.]

[N. B. It is surmised this act will lead the way to the improvement of other of the king's lands, now yielding little profit, and that it was promoted by the earl of *Clarendon*, chancellor of the duchy, with that view.]

(D 89.) *When lands shall be divested out of the king. By office.* As the king takes by matter of record, so, generally, his estate shall not be divested, without office, or other matter of record.

As, if land be given to the king by deed enrolled, upon a condition; the grantor cannot enter for the condition broken, without office.

But where the king's estate depends upon the estate of another, if the former be defeated, the remainder to the king shall be divested, without office; as, if land be granted to *A.* for life, with power of revocation, remainder to the king; if the uses are revoked, the king's remainder is divested without more. *R. 2 Rol. 215. l. 45.*

So, if an estate be demised to *A.* for life, remainder to the king, upon condition, that if the lessor pays to *A.* 10*l.* he shall re-enter; if he pays he may re-enter, and divest the remainder in the king without office. *R. 2 Rol. 215. l. 35. Mo. 546.*

(D 90.) *By judgment. Ouster les mains.* If upon a petition, *monstrance de droit*, or traverse, the plaintiff recovers, judgment shall be given *quod manus domini regis amoveantur*; and thereupon a writ of *ouster les mains* goes, which is to the effect, that the plaintiff shall have his lands, seised by the king, out of the king's hands. *Stamf. Prer. 77. b.*

Vide ante, (D 82.)

Prærogative Court.

Vide Courts, (N 2.)

(A) Who may make it.

[ALL prescriptions must have a legal origin; but customs need not. 6 Co. 59. Hob. 86. 1 Vent. 383. 386. 11 Mod. 148. 161. Dougl. 126.]

A prescription, regularly, ought to be, by a man, in him and his ancestors, or in him and those *quorum statum ille habet*, or by a corporation, in them and their predecessors. Co. L. 113. b. *Vide post* (H).

Yet an officer may prescribe in him and all those *quorum statum habet*. Kit. 106.

So, the Chancellor may prescribe, that he and all Chancellors, &c. have used, time whereof, &c. though he be not a corporation, and has the office only at will. *Ibid*.

So, the Ch. J. of B. may prescribe, that he and all Ch. Justices of B. have used to grant such offices: *Ibid*.

So, a serjeant at law, that he and all serjeants have used to be impleaded by bill, and not by original. 2 Rol. 264. l. 10.

An attorney, that he and all attorneys of the same court have privilege. 2 Rol. 264. l. 15.

An under-sheriff, that he and all under-sheriffs have used to take such fees. 2 Rol. 264. l. 27.

(B) Who not.

BUT where an officer is only at will, it is more proper to allege a custom, than to make a prescription; as, the Ch. Justice of B. may allege a custom, that every Ch. Justice of B. hath used to make a grant of such an office. 2 Rol. 264. l. 20.

So, a sheriff cannot prescribe, that he and all sheriffs have used, &c. for he is but an annual officer, and removeable at will. 2 Rol. 264. l. 23.

[None can prescribe (for right of common) but such whose interests are permanent; therefore tenant at will or for life cannot prescribe, nor the occupier of a house; but they may in the usage and custom of the vill. *Englsh v. Burnell*, P. 5 G. 3. 2 Willf. 258.

[A copyholder cannot prescribe in a *quæ estate*, because the freehold interest is in the lord. *Doug*. 713.]

(C) What Things may be claimed by Prescription.

ALL franchises or privileges, which a man may have without a title appearing upon record, he may claim by prescription; as, waifs, estrays, wreck, treasure-trove, &c. Co. L. 114. b. 2 Rol. 270.

A 45. 5 Co. 109. *Vide Waife*. *Vide Franchises*, (A 1.)

So, royal fishes; as, whales, sturgeons, &c. Co. L. 114. b.

So, a park, warren, &c. *Ibid*.

So, fairs, markets, frank-foldage, toll, &c. *Ibid*.

A corporation may be by prescription. *Ibid*.

So, a man may claim, by prescription, liberty to hold courts, a court-leet, hundred, &c. Co. L. 114.

The custody of a gaol, &c. Co. L. 114. b.

So,

So, a man may claim by prescription, to be tenant in common with another. *Lit. f.* 310. *2 Rol.* 264. *l.* 32.

[So, a man may prescribe to be exempted from serving on juries; these exemptions are not taken away by any of the statutes concerning juries. *Doug.* 188.]

(D) What not.

BUT franchises or liberties, which cannot be seized as forfeited, before the cause of forfeiture appears upon record, cannot be claimed by prescription; as, *bona et catalla proditorum, felon., felon. de se, fugitivor., utlagat., aut in exigend. positor.* *Co. L.* 114. *a.* *2 Rol.* 270. *l.* 20. *Vide Waife* (B—C—D). *Vide Franchises*, (A 2.)

Deodand, sanctuary, &c. *Co. L.* 114. *a.* *Vide Waife*, (E 1, 2.)—*Abjuration* (D).

Privilege to make a corporation, coroner, conservator of the peace, &c. *Co. L.* 114. *Vide Franchises*, (F 5.)

To have a conuance of pleas, &c. *Co. L.* 114. *a.* *Vide Courts*, (P 3.)

So, a man cannot make title to land, by prescription. *Co. L.* 114. *b.* *2 Rol.* 264. *l.* 3.

Nor can he claim to be joint-tenant with another; for the survivor takes. *Co. L.* 195. *b.*

Yet a man may claim a county palatine by prescription, and in respect thereof, to have *bona et catalla felon., &c.* *Co. L.* 114. *b.* *Vide Franchises*, (D 1.)

(E) What shall be a good Prescription.

(E 1.) Must be Time out of Mind.

TO every prescription there are two inseparable incidents; time and usage. *Co. L.* 113. *b.* *Vide Copyhold*, (S 2.)

Prescription and time whereof no memory runs to the contrary, are all one in law. *Lit. f.* 170.

And this is understood, not only of the memory of any one living, but also of proof by any record or writing, or otherwise to the contrary; for that shall be said within memory. *Co. L.* 115. *a.*

[Thus a lease of ground for fifty-six years, to be a passage, shews it is not by prescription; and suffering it to be used for three or four years after the expiration will not amount to a gift to the public. *Rex v. Hudson*, *T.* 5 *G.* 2. *Str.* 909.]

And therefore where there is any proof of the commencement, or original, of any thing, it cannot be claimed by prescription; as, if a vicarage be endowed *de minutis decimis* 1310, and the parson appropriate be sued by the vicar for them; the parson cannot prescribe against such demand; for his prescription must begin after the endowment, which is within time of memory. *R.* 2 *Rol.* 269. *l.* 50.

So, though a prescription be alleged for things spiritual or ecclesiastical, it ought to be time whereof, &c. though by the canon law it is restrained to forty years. *2 Inst.* 653.

Yet where the commencement and original were before the time of king *R.* 1. it may be claimed by prescription; for all time before

R. 1.

R. 1. is called time out of memory, upon an equitable construction of the *ſt. W. 2.* which limits it for a writ of right. *2 Rol. 269. l. 10*—45.

[A grant or charter from the crown, which ought to be by matter of record, may, under circumstances, be presumed, though within time of legal memory. *Mayor of Kingſton v. Horner, B. R. T. 14 G. 3. Cowp. 102.*]

[A presumption founded on a poſſeſſion of 350 years was adjudged by the court a ſufficient ground. *Ibid.*]

And therefore in an annuity claimed of a prior by preſcription, if it be pleaded that the priory was founded within memory, he ought to ſhew the foundation ſince the reign of R. 1. began. *2 Rol. 268. l. 25. 269. l. 50.*

So, a charter, &c. before the time of R. 1. may be uſed as evidence of a preſcription for a thing granted by the charter. *2 Rol. 268. l. 5.*

[The rule with regard to preſcriptions is, that every preſcription is good, if by any poſſibility it can be ſuppoſed to have had a legal commencement. *1 T. R. 667.*]

[An ancient grant, without date does not neceſſarily deſtroy a preſcriptive right; for it may be either before time of memory, or in confirmation of ſuch preſcriptive right, which is matter to be left to jury. *2 Bl. Rep. 989.*]

[Poſſeſſion for above 100 years of a pew in a church is not a ſufficient title to maintain an action on the caſe for diſturbance in the enjoyment of it; but the plaintiff muſt prove a preſcriptive right or faculty, and ſhould claim it in his declaration as appurtenance to meſſuage in the pariſh. *Stocks v. Booth, B. R. M. 27 Geo. 3. 1 T. R. 428.*]

[Uninterrupted poſſeſſion of a pew in the chancel of a church for thirty years is preſumptive evidence of a preſcriptive right to the pew in an action againſt a wrong-doer; but that preſumption may be rebutted by proof that the pew was not in exiſtence thirty years ago. *Griffith v. Matthews, B. R. T. 33 Geo. 3. 5 T. R. 296.*]

(E 2.) Muſt have a long and quiet Uſage.

So, every preſcription ought to have long, continual, and peaceable uſage, or enjoyment. *Co. L. 113. b.*

And therefore, if repeated uſage cannot be proved, the preſcription fails.

So, if an uſage within time of memory cannot be proved, the preſcription fails; as, if a town was incorporated before the time of R. 1. and their franchises were never afterwards uſed, they are void. *2 Rol. 268. l. 52.*

Yet a tortious interruption of the uſage, for ten or twenty years, does not deſtroy a preſcription; as, if a preſcription be alleged of a *modus* for tithes of lambs, and it be found that ſuch *modus* was paid *whereof*, &c. till twenty years laſt, and for that time tithes in *kind*; yet the verdict is for the preſcription. *Co. L. 114. b. 2 Inſt. 3.*

So, if the plaintiff in a writ of *meſne* preſcribes for acquittal, and it be found, that at all times there was acquittal, till a purchaſe by the

the grandfather of the plaintiff, and since no acquittal, the verdict is for the plaintiff. *Co. L. 114. b. 2 Rol. 271. l. 40.*

If a man prescribes for common, and the usage was discontinued for many years by a lease of the terre-tenant. *2 Inst. 654.*

If tenants of *antient demesne*, by coercion, have paid toll, &c. for many years. *2 Inst. 654.*

[If an impropiator makes a lease of a farm, and all tithes thereto belonging, or therewith usually letten, and afterwards makes a lease of the rectory, and the lessees of the rectory have usually received the tithes of the farm, and the lessees of the farm never have; the tithes shall be paid to the *lessee* of the rectory. But as to the impropiator himself, *Q. Quaintrell v. Wright, M. 1729, Bunb. 274.*]

(E 3.) Must be certain.

So, a prescription ought to be certain; and therefore, a custom or prescription for copyholders paying to the lord, for a fine upon a death, *two years rent or less*, is ill. *R. 2 Rol. 264. l. 54. Vide Copyhold, (S 19.)*

So, a prescription to pay for tithes *1 d. or thereabouts* for every acre of arable. *R. 2 Rol. 265. l. 5.*

But a prescription, that *magna pars rivuli* runs, &c. is good; for it is not necessary to shew how much. *R. 4 Co. 88. b.*

[And a prescription to take three bushels of barley out of every ship's cargo of barley brought upon the key for exportation, is good. *Sargent v. Reed, P. 18 G. 2. Str. 1228. Wilf. 91.*]

That he ought to have, as appurtenant to his house, so much estovers as a man can dig in one day, without saying, to be burnt in his house; for it is ascertained by being confined to so much as a man can dig in one day. R. 1 Lev. 231.

(E 4.) Must be reasonable.

So, every prescription ought to be reasonable; and therefore, a man cannot prescribe for an heriot upon the death of every stranger within his manor. *Vide Copyhold, (S 3, &c.)*

Nor, for warren in the lands of a stranger, which are not within his fee, or feigniory. *2 Rol. 265. l. 52.*

Nor, for setting out his tithes without the view of the parson. *R. Hob. 107.*

So, a man cannot prescribe, that he and his ancestors, seised of the manor of C., have been exempted from the government of the mayor of London (where it lies) and his officers; for that would be to be without government. *R. 2 Rol. 265. l. 20.*

Nor, that he has the assize of bread and ale, and the search and correction of weights and measures, without having a court for it; for that is proper to the leet. *R. 2 Rol. 265. l. 25.*

Nor, that no forester, sheriff, &c. intermeddle in his manor, if he has not a court there. *Jon. 271.*

So, a sheriff cannot prescribe for the taking of gifts for doing his office. *2 Rol. 266. l. 10. 50.*

So, a lord of a leet, who has no land besides his leet, cannot prescribe to have the waifs of the town where his leet is, against the lord of the same town. *2 Rol. 266. l. 52.*

But

But a prescription may be reasonable, though it be unusual, or inconvenient; as, a man may prescribe for a way over a church-yard, or through the church. 2 *Rol.* 265. l. 40.

For *estovers* for repairing or building new houses. *Per three J.* 2 *Cro.* 25.

So, a corporation may prescribe for 3*d.* per pound of all merchandize in such a port, in respect that it is owner of the port, and maintains the key, and a crane, and perches for directing ships in the channel. *R.* 2 *Rol.* 265. l. 30. *Vide Copyhold*, (S 18.)

A lord of a manor may prescribe for foldage, and that none erect hurdles there in his own land, without licence. *R.* 1 *Leo.* 11.

[A lord of a manor may prescribe for toll of all goods landed within the manor in consideration of repairing a wharf within the manor; though the prescription be laid more extensively than the consideration alleged. *Cowp.* 47.]

[The lord of a fanchise is not, as such, bound to repair a gaol within it; but he may be subject to such a charge by immemorial usage. *Rex v. Exeter*, T. 35 *Geo.* 3. 6 T. R. 373.]

(F) What shall not be good.

(F 1.) Prescription against the King.

BUT a prescription is not good which runs against the king's right, for *nullum tempus occurrit regi.* 2 *Rol.* 264. l. 40. [*Vide stat.* 9 *Geo.* 3. c. 16. *Vide Copyhold*, (S 12.)]

As, if the king was patron of right of a chapel, no other can have it by prescription. 2 *Rol.* 364. l. 42.

[Yet if a man claims tythe-hay, under an express grant of the king, and has never received any for many (as 120) years, he shall not recover it. *Stone v. Redcut*, H. 1728, *Bunb.* 262.]

So, a man cannot prescribe to have, or be discharged of, the great custom, which is an antient revenue of the crown. *R.* 2 *Rol.* 264. l. 45.

So, a prescription for toll, wreck, &c. does not extend to the king's goods. *Dav.* 33. b.

(F 2.) To do a Wrong, or a Nufance.

So, a man cannot prescribe to do a wrong or a nufance; as, to erect a dove-cote. *R.* 2 *Rol.* 265. l. 10. 2 *Cro.* 491.

To put logs *passim*, or wood for a continuance, in the highway. *R.* 2 *Rol.* 265. l. 15. *R.* 2 *Cro.* 446.

To make assart or wast. *Semb. Jon.* 271.

So, a corporation cannot prescribe to arrest upon suspicion of felony, and imprison for three days, and then send to the common gaol. 2 *Rol.* 265. l. 50.

(F 3.) Contrary to a Statute.

So, a man cannot prescribe against a statute; for that is the highest record. *Co. L.* 115. a. *Vide Copyhold*, (S 5.)

But he may prescribe against a statute, where his prescription is preserved by another statute. *Co. L.* 115. a.

And therefore a custom in *London*, that an apprentice to one trade within the city, may use any other trade there, shall be good, notwithstanding the *st. 5 El. 4. Semb. Cro. Car. 347. 516.*

So, where a statute is in the affirmative only, a man may prescribe for the same matter; as, the custom to devise remains, notwithstanding the statutes 32 & 34 *H. 8.* which give power to devise. *Co. L. 115 a.*

So, if a statute in the negative be only declaratory of the common law, a man may prescribe against the statute as well as against the common law; as, where the *st. M. Ch. 35.* says, that the leet shall be holden only *bis in anno*, at *Michaelmas* and *Easter*, which was the common law, the lord may prescribe to hold it at other times and oftner. *Co. L. 115. a. Vide Leet (C).*

Where the *st. 34 Ed. 1. de forestis* enacts, that none shall cut down his trees in a forest, without the view of the forester, which was the common law, a man may prescribe to cut down, without his view. *Co. L. 115. a. R. cont. Jon. 270. 291. Vide Chase, (N 3.)*

(F 4.) Contrary to another Prescription, &c.

So, a man cannot prescribe against another prescription; for the one is as antient as the other; as, if a man prescribe for a way, light, or other easement. another cannot prescribe for liberty to stop it when he pleases. *R. 9 Co. 58. b. 2 Mod. 105. Vide Copyhold, (S 17.)*

So, a man cannot claim, by prescription, a liberty given to him by the common law; as, for privilege to abate a nuisance.

To distrain for a rent-service.

To pay tithes without fraud. *R. Hob. 107.*

So, a man cannot controvert the commencement of a prescription; as, if a man prescribes for rent, and to distrain for it, it cannot be alleged that it was always paid by coercion. *Co. L. 114. a.*

But, a man may prescribe, that a lord, for him and his tenants, hath paid so much; and in respect thereof, he and his tenants were discharged of tythes; and that he is tenant of a tenement, which time whereof, &c. was parcel of the manor; though the one prescription must be prior to the other. *R. Yel. 2.*

So, he may prescribe for holding a court, and that the court, time whereof, &c. issued process. *R. 1 Sal. 203.*

So, he may prescribe for a thing, which qualifies another prescription; as, if *A.* prescribes for common, *B.* may prescribe to inclose, when he has lands lying there together. *Semb. 2 Mod. 104.*

(G) How a Prescription shall be destroyed.

IF a man prescribe to a thing which is totally destroyed, the prescription is gone; as, if the repair of a castle be claimed by prescription, and the castle be demolished, the prescription is destroyed. *4 Co. 88. Vide ante, (E 1, &c.)—Dismes, (E 13. 20.)*

So, if a man has franchises by prescription, and the king grants the same liberties to him by charter; he cannot afterwards claim them by prescription. When extinguished by unity of possession, *vide Suspension (G).*

So, if a *modus* be not entirely settled, payment in kind destroys it. *Sav. 13. Vide Dimes, (E 20.)*

But,

But, a circumstantial variation in a thing, to which a prescription is annexed, does not destroy the prescription; as, if a man prescribe in *modo decimandi* for the tythes of a park; if it be disparked, the prescription continues; for it is annexed to the lands. *R. Hob. 39. Vide Difmes, (E 20.)*

Or, for tythes of a mill, and two new mill-stones are added. *Dub. Sho. 281. R. 4 Mod. 45.*

If a corporation prescribes, and afterwards has a new name, &c. the prescription continues. *4 Co. 87. b.*

If a man prescribes for a water-course to a fulling-mill, and he converts it to a grist-mill. *R. 4 Co. 87.*

So, if he claims *estovers* to a house, which is pulled down; if it be afterwards rebuilt, the prescription revives. *Hob. 39. 4 Co. 87. b.*

(H) How pleaded.

[ALL prescriptions are in their nature entire; and when they are pleaded the adverse party cannot deny a part only, but he must either demur or traverse the whole. If the defendant plead a prescription, and fail in proving any part of it in evidence, he must fail in the whole. *Morewood v. Wood, B. R. H. 31 Geo. 3. 4 T. R. 159.*]

Every one who pleads a prescription, ought to allege it in him who has the inheritance; as, to say that he is seised in fee, and he and his ancestors, or he and all those *quorum statum ipse habet*, &c. *Co. L. 113. b. Vide ante (A).*

Or, that a corporation and their predecessors. *Co. L. 113. b.*

[Therefore, if tenant for years pleads prescription in his own name, it is bad; it ought to be in the lord's, who is tenant in fee. *Smith v. Morris, T. 5 & 6 G. 2. Fort. 340.*

And therefore, where a copyholder prescribes for common, &c. in *alieno solo*, he ought to prescribe that the lord of the manor, who has the fee, time whereof, &c. had common there for him and his tenants. *R. 4 Co. 31. b. Vide Copyhold, (P 4.)*

And where common is claimed in the soil of the lord, so that he cannot prescribe in him, he ought to allege it by way of custom; for he cannot prescribe in himself, in respect of the baseness of his estate. *R. 4 Co. 31.*

So, a man cannot allege a prescription for common, or other profit, in *alieno solo*, in the inhabitants of a town, or of the antient houses of a town *ratione residentia*; for the inhabitants, perhaps, have not the inheritance. *R. 6 Co. 60. 2 Cro. 152. 2 Leo. 44. Godb. 97. R. 2 Cro. 446.*

So, he cannot prescribe, that every *pater-familias* of an antient house had common, &c. for, perhaps, he was but tenant for years, at will, by statute-staple, &c. *R. 6 Co. 61. a.*

So, it is not good that every freeman of a corporation had common; but he ought to prescribe in the corporation. *R. 2 Jen. 115.*

So, he cannot prescribe, that *A.* tenant for life, and *B.* in remainder, ought to have common. *Dub. 1 Leo. 177. Cro. El. 154.*

That *A.* who has a grant to be parker for his life, and his predecessors have, time whereof, &c. *Semb. Dy. 71.*

So, he cannot say, all the possessors of such land ought to make *tenues*. *Semb. 2 Cro. 665.*

So, if a jury finds that all occupiers have used to repair, it is not a good finding of a prescription; for, perhaps, the occupiers were only particular tenants, and their acts do not bind the inheritance. *R. 5 Co. 99. b.*

Or, a declaration alleges a custom, that all occupiers of a close ought to have a way, &c. *R. Cro. Car. 419. Jon. 367.*

So, if it be alleged, that *A. & omnes tenurum illam habentes*, have used, &c. it is not good. *Godb. 54.*

But inhabitants, &c. may prescribe for an easement, &c. *in alieno solo*; as, for a way, &c. *6 Co. 60. 2 Cro. 152. Semb. (cont.) Cro. El. (441.) 180. Cro. Car. (R. acc.) 419.*

So, inhabitants may prescribe to have sacraments administered, or for burial in the church-yard. *2 Rol. 264. l. 16.*

So, to be discharged of toll. *R. 2 Sho. 257.*

So, for the privilege of dancing in the close of another. *R. 1 Lev. 176.*

[A custom for all the inhabitants of a parish to play at all kinds of lawful games, sports, and pastimes, in the close of *A.*, at all seasonable times of the year, at their free will and pleasure, is good. *Fitch v. Rawling, C. P. H. 35 Geo. 3. 2 H. Bl. 393.*]

[A similar custom for all persons for the time being, being in the said parish, is bad. *Ibid.*]

[A custom, that "where the customary tenant of a manor has coal-mines lying under the freehold lands of other customary tenants, within and parcel of the manor, he may sink pits in those lands to get the coals, &c.; may lay the coals when got, and the earth and rubbish, &c. on the land near to such pits, such lands being customary tenements and parcel of the manor, there to remain and continue (not saying how long, or for a convenient time); may lay and continue wood there for the necessary use of the pits; may take away in carts and waggons part (not saying how much) of the coals, and burn and make into cinders the other parts there at his will and pleasure," is a bad custom, as being uncertain and unreasonable. *Broadbent v. Wilks, C. P. T. 16 Geo. 2. Willes, 360.*]

So, inhabitants may prescribe for a matter of discharge in their own soil; as, *in modo decimandi*. *6 Co. 60. 2 Cro. 152. Semb. Hob. 86. R. Hob. 118. R. 3 Lev. 386.*

So, it will be a good prescription to say, *quod tenentes, et occupatores* of such a close, ought to repair the fences; for *tenentes* imports the tenants of the fee. *R. 1 Sal. 335, 6. Semb. 2 Cro. 665.*

[So, though the parish at large be *prima facie* bound to repair all high roads lying within it, yet, by prescription, they may throw the onus on particular persons, by reason of their tenure. *2 Term Rep. 106.*]

That the burghesses in a corporation, inhabitants in messuages there, ought to have common; for the common is not alleged due to inhabitants, but to burghesses, who inhabit there; and to say, that every burghess shall have it, is as well as that the corporation shall have it, for them and every burghess. *R. 2 Lev. 253.*

That all farmers; for that is *tantamount* to all occupiers. *R. (cont.) 2 Lev. 163.*

When a man may prescribe by a *que estate*, vide *Pleader*, (E 23, 24.)

If a man claim s, by prescription, a thing incident, &c. to another, he

he ought to say, that the thing, to which, &c. *est antiqua*; as, if he prescribes *in modo decimandi* to a park, he may say, *quod est antiquus parvus*. *Hob. 44.*

So, if he alleges an usage to put swine into a park, as incident to the office of parker. *Dy. 71. b.*

If he alleges a custom in a town, it is sufficient to say, *antiqua villa*. *10 Co. 59. b.*

[A corporation may prescribe for a *port* duty, without shewing they are owners of the soil, or that they repair. *Mayor of Yarmouth v. Eaton, T. 3 G. 3. 3 B. M. 1402.*]

If he alleges a custom in *London*, &c. he ought to say, *quod est antiqua civitas*. *R. Cro. El. 169.*

[A custom of *London* must be pleaded, or the court cannot judicially take notice of it. *Hartop v. Hoare, P. 16 G. 2. Str. 1187. 1 Wils. 8. 3 Atkyns, 44.*]

But, if a thing is not directly mentioned, as that to which, &c. it need not be alleged; as, if he prescribes *in modo decimandi* in so many acres in such a park; it is not necessary to say, *quod est antiquus parvus*. *R. Hob. 118. 44.*

So, if there be words *tantamount*, it is sufficient; as, if he says, that the defendant diverted a water-course *a solito et antiquo cursu* to a mill, without saying, *quod est antiquum molendinum*. *3 Lev. 133. 3 Mod. 50.*

So, if he says, *quod cum molendinum fuit ab antiquo erectum*. *R. 1 Lev. 273.*

That he stopped a window *per quam lumen inferri consuevit*. *R. Sal. 459. (Semb. cont. upon a demurrer.)*

Yet, where a park, office, or other thing is claimed by prescription, it is not sufficient to say, *quod est antiquus parvus*, &c. but he ought directly to prescribe to it. *R. 10 Co. 59. b. Hob. 44.*

If a man makes title to a thing by prescription, he ought to prescribe for it directly, and it is not sufficient to say, that he and all whose estate, &c. have used, &c. as if he prescribes for picage, for goods exposed in a market. *R. 2 Jon. 227.*

So, regularly he ought to prescribe in an usage; for it is not sufficient to say, that every tenant of a manor *potuit & potuisset sursum reddere*, &c. *Ray. 4. 3 Leo. 83.*

But, where a custom is alleged within *London*, it is sufficient to say, *uti possit*, &c. *Semb. Cro. Car. 347. R. Ray. 4.*

So, if a custom be an inducement only to an action, it is sufficient if it be alleged, *quod solet*, without saying, *solet & debet*: as, in covenant against an infant for departure from his master, being an apprentice, by the custom of *London*. *R. 1 Lev. 12.*

So, after verdict it will be well, if a thing be alleged by way of prescription, where it ought to be by custom. *1 Lev. 177.*

[A plea of prescription for common in a *que* estate is good after verdict, though it be not in *express terms* alleged that the owners of the estate have used it time immemorial. *3 Term Rep. 147.*]

For more of title *Prescription*, vide *Chimin*, (D 2.)—*Dignity*, (C 1.)—*Dismes*, (E 2, &c.)—*Franchises*, (F 4.)—*London* (H).—*Pleader*, (C 38.)—*Rent*, (C 7.)—*Temps*, (G 12.)—*Toll*, (G 1.)

PREAMBLE.

Vide Parliament, (R 11.)

PREBEND AND PREBENDARY.

Vide Ecclesiastical Persons, (C 4.)

PRECEDENCE.

Vide Justices (D).—Ley, (D 2.)—Nobility (A).

PRELATE.

Vide Certificate, (A 1, &c.)—Ecclesiastical Persons, (C 1, 2.)—Esglise, (H 11.)—Heresy, (B 2.)—Ireland (E).—Justices, (L 3.)—Pleader, (3 I 12.)—Visitor, (A 5. 8.)

PREMISES OF A DEED.

Vide Fait, (E 3, 4.)

PRESENTATION.

Vide Esglise, (H 1, &c.)—Pleader, (3 I 5.)—Popery, (B 8.)

PRESENTMENT.

Vide Chimin, (C 11, 12.)—Copyhold, (F 10, 11.—M. 7.)—Indictment (B—C).—Leet, (G 1, 2.)—Sewers (G).—Visitor, (A 11.)

Darrein Presentment.

Vide Quare Impedit, (C 1, &c.)

PRESENT ESTATE.

Vide Chancery, (3 Y 8.)—Devise, (N 18.)

PRESIDENT OF THE COUNCIL.

Vide Roy, (E 2.)

PRICES OF VICTUALS, &c.

Vide Justices of Peace, (B 89. 95. 99.)—Leet, (L 9. 14.)

PRIMER SEISIN.

Vide Prærogative, (D 59.)

PRINCE AND PRINCESS.

Vide Justices, (K 1, &c.)—Roy (G).

PRINCIPAL.

Principal and Accessory.

Vide Justices, (T 1, &c.)

Principal and Bail.

Vide Bail, (Q 2, &c. R 3, &c.)

Principal and Incident.

Vide Prohibition, (G 23.)

Principal and Interest.

Vide Chancery, (3 S 1, &c.—3 Y 9.—4 A 1, &c.)

PRINTING.

Vide Chancery, (D 13.)—Trade (B.)

PRIOR.

Vide Ecclesiastical Persons, (B 2.)

PRIOR INCUMBRANCE.

Vide Chancery, (4 A 10.—4 I 6.)

PRIORITY.

Vide Privilege, (C 2.)

PRISAGE.

Vide Prærogative, (D 45.)

PRISON AND PRISONER.

Vide Escape.—Imprisonment.—Justices (R).—Justices of Peace, (B 69.)—Officer, (G 8.)—Rescous.—Uses, (N 9.)

PRIVATE WAY.

Vide Chimin, (D 1, &c.)

PRIVILEGE.

(A) Privilege to the Person of a Man to be free from Arrest.

(A 1.) In Attendance upon the Courts.

*PRivilegium est jus singulare, seu lex privata, quæ uni homini vel loco conceditur. Bl. Nom. verb. Privilege.**If a man has a subpœna, &c. to attend the courts of justice in Westminster, and be arrested by process during his attendance upon the court, he shall be discharged. R. in Chancery, 1 Ch. R. 217.**So, if he be in Palace-yard sedente curiâ; and the bailiff may be committed. 2 Mod. 182.*

So, he shall be protected *eundo & redeundo*. *Semb. 4 Ed. 4. 21. a.*
Though he goes forty leagues out of his way. *Bro. Priv. 4.*

[A party who has attended his cause all day in court, and in the evening retires to dine with his attorney and witnesses at a tavern in *Palace-yard*, is privileged from arrests, *causâ redeundi*. *2 Bl. Rep. 1113.*]

[But false imprisonment does not lie for such an arrest; it is a breach of the privilege of the court, for which an attachment will be granted. *2 Bl. Rep. 1190. Dougl. 675.*]

[If defendant, returning from court to justify bail, is arrested, he shall be discharged. *Barnes, 27.*]

[Attorney waiting till judge comes, to attend a summons, and the hour expires, if arrested, shall be discharged. *Barnes, 378.*]

So, if the defendant himself attends the trial of his cause, and be arrested *in facie curiæ*, he shall be discharged. *R. 1 Brownl. 15.*

[So, the party to a cause is protected during his attendance on an arbitration under a rule of *nisi prius*. Case of *Hetley*, in the *Exchequer*, *Tr. 1788.*]

So, the plaintiff shall have privilege, if he be arrested by the defendant *veniendo ad curiam* to attend his cause. *Bro. Privil. 57.*

So, a *cestuy que use*, who attends a suit by his feoffee. *Bro. Privil. 1.*

Or, a servant or farmer, who brings money to his master or lessor (plaintiff or defendant) for the suit. *Bro. Priv. 1.*

[All persons who have relation to a cause which calls for their attendance in court, and who attend in the course of that cause, though not compelled by process so to do, (such as bail,) are privileged from arrest *eundo et redeundo*; provided their attendance be not for any unfair purpose, such as in the case of bail for an insolvent person to justify. *Mukins v. Smith, C. P. E. 31 Geo. 3. 1 H. Bl. 636.*]

So, this privilege extends to a party or witness, who attends in inferior courts of record; as, in the courts in *London*. *Semb. 1 Brownl. 15.*

In a session of the peace. *Ray. 100. 1 Lev. 159. Bro. Priv. 35. Crom. 7. 162. (180. edit. 1617.)*

In the leet, as a juror. *Latch, 198.*

If a justice of peace, clerk of the peace, or other officer, be arrested *veniendo* to sessions. *Crom. 7. 162. (180. b. edit. 1617.)*

[A person attending commissioners of bankrupt, or other commissioners under the great seal, under their summons, is not liable to arrest. *Semb. Kerney's case, M. 1744, 1 Atkyns, 54.*]

[But, the court of *B. R.* refused to discharge a person in custody by process of the sheriff's court in a cause afterwards removed into *B. R.* because he was arrested while attending commissioners of bankrupt to prove a debt. *Kinder v. Williams, B. R. T. 31 Geo. 3. 4 T. R. 377.*]

So, if a party attends, to take out an original writ, writ of error, or pardon of outlawry, &c. *Bro. Priv. 22.*

So, privilege extends to the horse, money, or other necessities for his journey, which the party has with him. *Bro. Priv. 6. 8. 27.*

In an action against a sheriff for an escape he shall plead such a discharge. *1 Brownl. 15.*

Or, if the discharge be by order of *Chancery*, the sheriff shall have an injunction. *R. 1 Ch. R. 218.*

But,

But, if a man be not arrested *in facie curiæ*, he cannot be discharged. *R. 1 Brownl. 15. Semb. 2 Mod. 182.* for there the party arrested found common bail.

Though he pleads the custom of *London* for his discharge. *1 Brownl. 15.*

So, a man cannot have a writ of privilege for his discharge. *Semb. Ray. 100. 1 Lev. 159.* but upon oath he shall be discharged. *Crom. 7. 162. b. (180. b. edit. 1617.)*

So, a man who attends the court without process, or necessity, to do a voluntary act there, shall not be privileged *eundo & redeundo*; as, if a defendant goes to the court to confess an indictment. *2 Ann. Sal. 544.*

So, if a juror in a leet be arrested by process out of an inferior court, *B. R.* will not grant an attachment, as if it was in their court; but an information. *Latch, 198.*

So, if a servant of the king be arrested, without licence of the king, or the lord chamberlain, or notice to him. *2 Keb. 3.*

But, an execution shall not be discharged, but the party committed, if he do not consent to the discharge of him arrested. *2 Ca. Ch. 69.*

So, if he be taken in execution, he shall not be dismissed; for then the creditor would be without remedy. *Crom. 7. 162. b. (180, 181. edit. 1617.)*

[Yet, defendant taken in execution, whilst attending writ of inquiry as attorney, was discharged. *Barnes, 200.*]

So, a servant of the king, being arrested, shall not be discharged by letter of the chamberlain, or rescued by his servants; for it is the king's privilege. *2 Keb. 3.*

[A servant of the king's taken in execution is entitled to be discharged on motion. *Bartlett v. Hebbes, B. R. T. 34 Geo. 3. 5 T. R. 686. T. Ray. 152.*]

[This privilege extends not to capital crimes; thus defendant, appearing upon his recognizance, was arrested in court upon a new warrant, for treasonable practices. *Rex v. Kelly, M. 9 G. Str. 530.*]

[A volunteer is not privileged from arrests, under an act privileging impressed men. *Turner v Turner, H. 31 G. 2. 1 B. M. 466.*]

(A 2.) Within a Place of Privilege.

So, if a man be arrested within a place having privilege, as in *Westminster-hall sedente curiâ*. *3 Inst. 141.*

Or, in the king's palace at *Westminster*, or other palace where the king resides. *Ibid.*

So, if a summons or citation be served there, the person shall be imprisoned. *3 Inst. 140, 141.*

But, an exemption from arrest shall not be allowed within an inn of court. *R. Skin. 685.*

(A 3.) How discharged.

If a man be arrested or sued, contrary to his privilege, he shall have a *superfedeas* out of *Chancery*. *Bro. Priv. 12, 13. Th. Br. 298, 299.*

Or, if his privilege be as an officer of the *Exchequer*, he may have a *superfedeas* out of the *Exchequer*. *Bro. Priv. 8. 16. 25.*

So,

So, if he be arrested and in custody, he may have a *habeas corpus*. *Bro. Priv.* 10, 11.

So, if he be privileged to be sued in another court, he shall plead his privilege. *Vide Abatement*, (D 4, &c.)

So, he shall have a writ of privilege, which contains a *superfedeas*. *Dy.* 287. a.

And if the inferior court proceeds after the *superfedeas*, or writ of privilege delivered, it will be null, and *coram non judice*. *Bro. Priv.* 28.

As, an officer of *B. R.* shall have a writ of privilege for his discharge, if in custody by process of *C. B.*, unless it be in a real action. *Th. Br.* 171.

[Attorney of *C. B.* returning from taxing costs, arrested by process of *B. R.*, *C. B.* cannot discharge him, but will grant rule against officer. *Barnes*, 200.]

(B) Privilege to be excused from an Office.

AN attorney shall have privilege, that he be not chosen to the office of churchwarden. *2 Rol.* 272. l. 15. *Th. Br.* 299.

That he be not overseer, constable, &c. *Th. Br.* 300. *Off. Br.* 160. 162. *Vide Attorney*, (B 16.)

[Attorneys are not privileged from serving in the militia, or paying for substitutes in their stead. *2 Bl. Rep.* 1123.]

[The deputy to the foreign opposer allowed writ of privilege to exempt him from serving constable. *Harrison's case* in *Sc. T.* 1718, *Bunb.* 24.]

[A baptist preacher qualified according to the stat. 1 *W. & M.* c. 18. is exempted from serving all parish offices, whether they existed before or were created since that act, even though he be also engaged in trade. *Kenward v. Knowles*, *C. P. E.* 17 *Geo.* 3. *Willes*, 463.]

[Allowed to a clergyman against serving the office of collector and expeditor to the commissioners of sewers. *Vicar of Dartford's case*, *H.* 12 *G.* 2. *Str.* 1107. *Andr.* 353.]

[Allowed to the deputy to the usher of the customs chosen headborough; for he is obliged to attend the court of Exchequer.]

[But refused to the chief accountant of the Navy-office chosen churchwarden; for he is not obliged to attend. *Bishop v. Lloyd*, *M.* 1728, *Bunb.* 255.]

[Writ of privilege lies not for a justice of peace not to be constable; he should apply to the sessions, under stat. 13 & 14 *C.* 2. c. 12. ff. 15. *De la Motte's case*, *P.* 12 *G.* *Str.* 698.]

(C) Privilege in Suits.

(C 1.) By being an Officer to a Court, &c.

SO, if a man be an attorney, or officer to *B. R.*, *C. B.*, &c. he has a privilege to be sued in the same court, and not elsewhere. *Vide Abatement*, (D 6.)—*Attorney*, (B 17, &c.)

So, if he be an accountant or minister of the *Exchequer*, or his servant attending upon him in his office. *Bro. Priv.* 8. *Vide Abatement*, (D 6.)—*Courts*, (D 2.)

If he be a serjeant at law. *Vide Ley*, (D 3.)

But

But a servant to an officer of the *Exchequer*, in husbandry, and not attendant upon the office, or his master, shall not have privilege. *Bro. Priv.* 8. 16.

So, if land lies in *antient demesne*, the *Cinque Ports*, &c. *ubi breve domini regis non currit*, the suit shall be for it in the court of *antient demesne*, &c. and not elsewhere. *Vide Abatement*, (D 1, 2, 3.)—*Antient Demesne*, (F 5.)—*Franchises*, (E 1, &c.)

[If an attorney dies insolvent, having a bill due to him from his client, in which is included a clerk of the crown-office's bill, he may have a rule to be paid by the original client, and not come in for his share of the insolvent's estate. *Waldron's case*, H. 13 G. 2. *Str.* 1126. *Rex v. Smollet*, P. 2 G. 3. 3 *B. M.* 1313.]

(C 2.) By Priority of Suit.

[Where an attorney of one court sues an attorney of another, the privilege of that court which is possessed of the cause shall be preferred. 2 *Bl. Rep.* 1325.]

So, if a suit be commenced in *B. R.*, *C. B.*, or other court of *Westminster*, and the plaintiff afterwards sues for the same cause in a base court, the defendant, arrested by process out of such base court, upon an *habeas corpus*, shall be discharged; as, if a plaintiff sues in *C. B.*, &c. and afterwards enters his plaint for the same cause in a court of *London*. *Bro. Priv.* 19. 24.

So, if he be afterwards arrested by process out of *B. R.* *Bro. Priv.* 22. 24.

So, a defendant shall have privilege, if he was arrested after the *teste* of the original in *C. B.*, though before the return, if the writ be afterwards returned; for it has relation to the *teste*. *Bro. Priv.* 4.

Though the plaintiff be *essoined*, or does not appear in *C. B.* *Bro. Priv.* 5.

Or, be afterwards nonsuited; if the action was depending at the time of the arrest by process out of the inferior court. *Bro. Priv.* 5. 9. 19.

But a defendant shall not have privilege upon an arrest out of a base court, if the *teste* of the original in *C. B.*, &c. be later than the arrest. *Bro. Priv.* 39. 53.

Or, if the arrest was before the return of the writ, and the writ never was returned. *Bro. Priv.* 5.

So, if after a suit commenced in *C. B.* a plaint be in *London*, to have a foreign attachment, and the defendant renders himself to prison there within a year and a day to dissolve the attachment, he shall not have privilege; for the render was *gratis*, and for his benefit. *Bro. Priv.* 6. *cont. ibid.* 29.

So, a defendant shall not have privilege if he be outlawed in the suit in *C. B.* before his arrest. *Bro. Priv.* 10.

If the action in *C. B.* was commenced by *covin*. *Bro. Priv.* 19. 31. 43.

As to the Privileges of Peers of Parliament,

Vide Dignity, (F 1, &c.)

P R I V I L E G E.

As to the Privileges of Ecclesiastical Persons,

Vide Ecclesiastical Persons (D).

As to Privilege of Parliament,

Vide Parliament, (D 17.—E 15.)

Vide more concerning Privilege, in Alien, (C 1, &c. 7, 8.—D 2.)
Ambassador (B).—Antient Demefne, (F 1, &c.)—Attorney, (B 16, &c.—
Bankrupt, (D 32, &c.)—Cemetery, (A 3.)—Chancery, (D 10.)—Chafe,
(N 3, 4, &c.—O 1, &c.)—Convocation (C).—Enfant, (D 1, &c.)—
Eftates, (C 3.—E 3.)—Franchifes, (E 1.)—London (L 1, &c.—M).
—Physicians (B).—Prærogative, (D 32. 85.)—Roy, (F 1.)—
Univerfity (B.—C).

P R I V Y.

Vide Confirmation.—Fine, (I 1.)—Pleader, (O 1, &c.)

P R I V Y C O U N S E L L O R.

Vide Parliament, (L 30.)—Roy, (E 2, &c.)

P R I V Y S E A L.

Vide Patent, (C 5.)

P R I V Y S I G N E T.

Vide Patent, (C 6.)

P R O B A T E.

Vide Administration, (B 6. 8, 9.)—Prohibition, (G 16.)

P R O C E D E N D O.

Vide Certiorari (D—G).—Prohibition, (K 1, &c.)

P R O C E E D I N G S.

When Evidence.

Vide Evidence, (C 1, &c.)

Proceedings, and Pleadings in particular Actions.

Vide Plea,—Pleader, (2 A 1, &c. to the end of the title.)

P R O C E S S.

(A 1.) Proceſs; who may iſſue it.

PROCESS, in a large acceptation, comprehends the whole proceeding after the original, and before judgment. 8 Co. 157. b. *Blackmore. Vide Amendment, (C 1.)*

But, generally, it imports the writs which iſſue out of any court, to bring the party to answer, or for doing execution.

When the king grants an authority of *oyer* and *terminer*, the power to iſſue proceſs is incident; for there cannot be *oyer*, if the party does not appear *gratis*, or be brought by proceſs.

And therefore where juſtices of peace have power to outlaw another, they may iſſue a *capias utlagatum*. R. 2 Rol. 277. l. 35.

(A 2.) In what Name.

All proceſs out of the king's courts ought to be in the name of the king.

By the ſt. 27 H. 8. 24. all writs original or judicial, all indictments for treaſon, felony, or treſpaſs, and all proceſs, ſhall be in the king's name, in counties palatine, or other liberties in *England* or *Wales*.

(A 3.) Under what Seal.

So, all proceſs ought to be under the great ſeal.

By the ſt. 28 Ed. 1. 6. no writ which concerns the common law ſhall go out under any of the petit ſeals.

(B) When Proceſs ſhall be returnable.

THE days for the return of proceſs are general or ſpecial. Co. L. 134. b.

By the ſt. 51 H. 3. *dies communes*; 32 H. 8. 21. & 16 Car. 6. in all real actions, (except writ of entry for a common recovery, right of advowſon, and dower *unde nihil habet*), if the writ come in, or be returnable in C. B. on any common return-day, day ſhall be given till the ninth return after inclusive.

In writs of entry for a common recovery, right of advowſon, and dower, *unde nihil habet*, till the fifth return inclusive.

And by the ſt. 32 H. 8. 21. in any writ of dower, till the ſixth return inclusive. *Vide 2 Inſt. 124.*

And by the ſt. 16 Car. 6. ſummons *ad warrantizandum* againſt a vouchee, upon appearance of the tenant in a writ of entry, or writ of right of advowſon, (which before were made for nine returns inclusive,) ſhall be abridged to five returns, as it was uſed in a ſummons *ad warrantizandum* in a writ of dower *unde nihil habet*.

By the ſtat. of *Mavl.* 52 H. 3. 12. *conf. by the 16 Car. 6.* in an aſſiſe of *darrein preſentment*, and *quare impedit*, *dentur dies de quindena in quindenam, vel de tribus ſeptimanis in tres ſeptimanas.*

Or, by conſent of the parties, a longer day may be given, if ſuch conſent appears upon record. 2 Inſt. 124.

By the common law, there ought to be fifteen days between the
reſte

teste and return in summons and attachments. *Co. L. 134. b. 2 Inst. 567. Mod. Ca. 146.*

[If there are not fifteen days between *teste* and return of *capias*, the proceedings cannot be stayed, but the writ may be quashed; it is error not irregularity. *Barnes, 76. 409, 410.*]

[If process is made returnable on a *dies non juridicus*, (as *Ascension-day*;) it shall be quashed. *Rex v. Knight, T. 1732, Bunb. 318.*]

[In a suit by bill in *B. R.* the *essoins*-day is not a return; and if a *feri facias* is made so returnable, the execution is void, and the goods must be returned. *Adams v. Sparry, M. 20 G. 2. 1 Wils. 155.*]

[If a *distringas* be made returnable *die lune prox. post quinden. Trin.* it is right; for *quinden Trin.* is a Sunday. *Rex v. Gumley, T. 2 G. 2. Str. 811. Ld. Raym. 1528.*]

[Next after eight days *from*, &c. is the same as next after the *etave*, &c. *Semb. Campbell v. Cumming, T. 1 G. 3. 2 B. M. 1187.*]

By the *st. art. super chart. 28 Ed. 1. 15. en summons et attachments en plea de terre, de formes conteigne la summons ou l' attachment le terme de 15 jours a tout la meyns, selonque la common ley.*

So, in re-summons and re-attachments. *2 Inst. 567.*

So, in a *pone*; for it is in the nature of a summons. *Ibid.*

In a *venire facias juratores*; for it is a summons to the jurors. *Ibid.*

So, by the *st. 16 Car. 6. in dower unde nihil habet*, the *venire facias*, and all process, after issue joined, and before judgment, need not have more than fifteen days, any more than in personal actions.

So, it may be in process upon an information, &c. which does not go to outlawry. *R. Sal. 699.*

But if a summons be returned *tarde*, &c. the *alias* summons shall have nine returns between the *teste* and return. *Co. L. 134. b. 2 Inst. 567. R. Dy. 252. a. Hutt. 43.*

So, process to outlawry in the crown office shall be *de termino in terminum*. *Sal. 699.*

So, process judicial in *B. R.* (in *Middlesex* particularly) may be *de die in diem*. *Sal. 602.*

[*Capias ad respond.* tested in *Trinity*, and returnable in *Hilary*, is void and a mere nullity. *Parsons v. Lloyd, M. 13 G. 3. 3 Wils. 341. 2 Bl. Rep. 846.*]

[One day between the *teste* and return of a special *latitat* is sufficient. *Living v. Avery, M. 5 G. 2. Str. 917.*]

So, by the *st. 16 Car. 6.* return from *Cra. Ascens. Domini* to *Cra. Trin.* shall be good, though there be not fifteen days between the *quarto die post Cra. Ascens.* before the *essoins*-day of *Cra. Trin.*

So, by consent, other than the common days of return may be taken. *Co. L. 134. b.*

So, by common law, and by the *st. art. super chart. 15.* in an assize before the justices of *B. R.*, *C. B.*, or justices in *eyre*, the justices may give a special day in term, or out of term; and therefore an attachment in an assize need not have fifteen days before the appearance. *Co. L. 134. b.*

[If there are fifteen days between the *teste* and return, both inclusive, of a *scire facias*, it is sufficient. *Hicks v. Jones, T. 13 G. Str. 765.*]

And by the *st. 32 H. 8. 21. & 16 Car. 6.* special days, where usual, shall be allowed. [In

[In suits by bill, *feri facias* must be returnable at a day certain, or shall be quashed. *Barnes*, 213.]

[If *ca. fa.* against an attorney is returnable at general return, and not day certain, it shall be quashed, and defendant superseded. *Barnes*, 413.]

[On the traverse of an inquisition sent out of Chancery to be tried in *B. R.* the *venire* must be returnable on a general return, and not on a day certain. *Rex v. Robert*, T. 17 G. 2. *Wilf.* 77.]

So, in a writ of execution there need not be fifteen days between the *teste* and return; as, in a *scire facias* for executing a fine, or recovery in a real action. *Co. L.* 134. b.

Nor in a *scire facias*, against bail. [But there must be fifteen days between the *teste* of the first *sci. fa.* and the return of the second. 2 *Bl. Rep.* 922.]

Nor, in a *per quæ servitia*, &c. *Co. L.* 134. b.

Nor, in any judicial writ. *Ibid.*

Nor, in process against an infant to be inspected. *Ibid.*

In a *pone* by the defendant. *Ibid.*

Nor, in error. 2 *Inst.* 567.

Nor, in a *venire facias* upon an indictment for treason, or felony, taken in *B. R.* 2 *Inst.* 568.

[By *stat.* 24 G. 2. c. 48. in real actions, if writ is returnable

Craf. Anim.	day shall be given	Quind. Martin.
Craf. Martin.	_____	Oct. Hilar.
Oct. Martin.	_____	Quind. Hilar.
Quin. Martin.	_____	Craf. Pur.
Oct. Hilar.	_____	Oct. Pur.
Quind. Hilar.	_____	Quind. Pasch.
Craf. Pur.	_____	Tres Pasch.
Oct. Pur.	_____	Mens. Pasch.
Quin. Pasch.	_____	Quinque Pasch.
Tres Pasch.	_____	Craf. Ascen.
Mens. Pasch.	_____	Craf. Trin.
Quinque Pasch.	_____	Oct. Trin.
Craf. Ascen.	_____	Quin. Trin.
Craf. Trin.	_____	Tres Trin.
Oct. Trin.	_____	Craf. Anima.
Quin. Trin.	_____	Craf. Martin.
Tres Trin.	_____	Oct. Martin.]

[There need be but fifteen days between *teste* and return of *venire*, and other process on writ of dower *unde*, &c. after issue joined, and before judgment.]

[All process having day from the fourth of *Craf. Ascens.* to *Craf. Trin.* are good.]

[Summons to warrant against vouches on common recoveries had, abridged to four returns inclusive.]

[Courts may appoint special returns as usual.]

[The days of assize in *darrein presentment* and *quare impedit*, and the days to be given in attain, stand.]

As, to the form or *teste* of process, vide *Abatement*, (H 1, Sc. 14.)

P R O C E S S.

(C) Process in Criminal Cases.

BY the common law, in an appeal, or indictment, for the death of a man, the process was a *capias*, and afterwards exigent and outlawry. *Vide Appeal*, (G 5.)

But for another felony there ought to be two *capias*'s before the exigent. *Ibid.*

By the *st.* 25 *Ed.* 3. 14. on an indictment of felony before justices of *oyer* and *terminer*, a *capias* shall go to the sheriff, and on a *non est inventus* returned, another *capias* to seize his goods, also returnable at three weeks, and if he be taken, or appear, before the return of the second *capias*, he saves his goods, otherwise the exigent shall go. *Vide Appeal*, (G 5.)—*Indictment* (I).

By the *st.* 6 *H.* 6. 1. the writs of *capias* before exigent, against any indicted in *B. R.*, shall be directed to the sheriffs of the county where the party dwells, as well as of the county where named in the indictment, having six weeks at least, or longer, if the justices in their discretion think fit, before the return; otherwise the exigent and outlawry on it shall be void. *

By the *st.* 8 *H.* 6. 10. on every indictment or appeal, for treason, felony, or trespass, against any, dwelling in another county than where the indictment or appeal was taken, after the return of the first *capias*, another *capias* shall go to the sheriff of the county, where the party is supposed dwelling, returnable three months after date, if the counties be held monthly; if at every six weeks, then four months after; commanding the sheriff, if the party be not found, to make proclamation at two counties, to appear at the return of the writ, in the county or franchise where indicted; and if then he appear not, the exigent shall go, &c.

(D) Process in Real Actions.

(D 1.) Summons.

IN all *precipes quod reddat* (*viz.* all real actions properly and strictly for demand of land) the original process is a summons.

As, in a writ of right *quia dominus remisit curiam*, &c. right of advowson, *precipe in capite*. *F. N. B.* 2. *F.* 5. *ſ.* 30. *E.*

In a writ of right of ward, *cessavit*, escheat, dower *unde nihil habet*, and *formedon*.

In all writs of entry.

In a *quod ei desorceat*.

So, in many writs of *precipe quod faciat*; as, in a writ *de rationabilibus divisis*, customs and services, *secta ad molendinum*.

So, in *nativo habendo*, *quo jure*, writ of *mesne*, *quod permittat*.

So, in all actions ancestor possessory; as, *mortd' ancestor*, *aiel*, *besaiel*, *cofinage*, and *nuper obiit*.

So, in an assise of *darrein presentment*, *quare impedit*, *juris utrum*

In an attaint; by the *st.* 23 *H.* 8. 3.

In a *warrantia charta*, *curia claudenda*, and partition.

So, where a stranger to the writ is to be cited *pendente lite*, process shall be against him by summons; as, upon voucher, *aide prier*, by summons *ad warrantizandum*, summons *ad auxiliandum*.

So, in personal actions for debt or contract, the original process is summons.

(D 2.) Re-summons.

If a summons be returned *tarde*, or not returned, there shall be an *alias* summons. *Off. Br.* 358. 361.

Or, returned that the demandant hath not found pledges. *Off. Br.* 357. 361.

Or, that none came to shew the land to the sheriff. *Off. Br.* 358, 359.

Or, that no proclamation was made according to the *st.* 31 *El.* 3. *Off. Br.* 357. 361.

(D 3.) *How executed.*] The sheriff in person, or by his bailiff, ought to summon the tenant in person, or upon the land demanded. *Fl. 6. c. 6. f. 4, 5.*

In personal actions summons shall be to the person, if he be within the county, or at his house. *Fl. 6. c. 6. f. 4.*

So, where the tenant has no land, whereon he may be summoned. *Fl. 6. c. 6. f. 5.*

In right of advowson, *quare impedit*, &c. it may be at the church. And the sheriff may enter the land of another, to summon the tenant. (1 *Brownl.* 158.)

If the action be for recovery of land, it ought to be in *terra petitâ*.

Tho' he be not actually tenant of the land. *Fl. 6. c. 6.*

Tho' he has only the reversion.

So, the heir shall be summoned on the land which descends.

The sheriff ought to take two summoners, *probos & legales homines*, to testify the summons. 1 *Brownl.* 158. 1 *Mod.* 248. In real actions. 2 *Sho.* 282.

And tho' now he does not make summons, yet it ought to be proved, if the summons be denied; for the sheriff returns the names of the summoners.

So, the summons ought to be in the day-time, before sun-setting. *R. Cro. El.* 42.

And fifteen days at least before the return of the writ. *Co. L.* 134. *b.*

And by the *st.* 31 *El.* 3. after summons in real action, proclamation shall be made of it on *Sunday*, fourteen days before the return, at or near the most usual door of the church or chapel of the town or parish where the land lies, on which the summons was made; otherwise no *grand cape* shall go, but an *alias* or *pluries* summons.

The summons shall be at the church-door, though the church be out of the county. *R. Cro. El.* 472.

And it is not sufficient to say, that he proclaimed all contained in the writ; but he ought to say, that he proclaimed that he made summons on the land. *R. Hob.* 133.

But, if the land be in several parishes, a summons in one is sufficient. *Hob.* 133.

So, a proclamation at the church of one parish is sufficient. *Hob.* 133. *Noy*, 22.

So, it is sufficient that the names of the summoners are returned, without saying that the summons was made. *Hob.* 133.

How he shall wage his law of non-summons, *vide Abatement*, (H 53.)

(D 4.) Grand Cape.

In all *precipes quod reddat*, if the tenant does not appear, or is es-
soined at the return of the writ, if he cannot save his default, he shall
lose his land; and therefore a *grand cape* issues to take the land into
the king's hand, and to summon the party to answer for his default.
(*Fl. 6. c. 14. f. 1. 3, 4.*)

The sheriff ought to take the land into the king's hand fifteen days
before the return of the writ. (*Fl. 6. c. 14. f. 1.*)

And he shall answer to the king for the profits of the land till judg-
ment.

And shall return a *cepi in manus*, with the names of the viewers
and summoners. (*Fl. 6. c. 14. f. 3.*)

But, a *superfedeas* to the *grand cape* shall be granted, *si errone*
emanavit; as, if he does not return a proclamation made according to
the *fl. 31 El. 3.* as if he does not say, that proclamation was made
after summons. *R. 1 Mod. 197.*

If it does not appear that any part of the land lies in the vill, at
the church of which proclamation was made. *1 Mod. 197.*

If the return says, proclamation was made *secundum formam statuti*,
generally, without saying, that it was of a summons upon the land.
R. 1 Mod. 197. Hob. 133.

The sheriff upon the *grand cape* cannot carry away any profits of
the land, but only seize it generally. *R. 1 Leo. 92.*

(D 5.) Petit Cape.

In all *precipes quod reddat*, if there be a default at the return of
the *venire facias* a *petit cape* shall be awarded for seizing the lands and
summoning the party.

The *petit cape* shall have fifteen days before the return.

The sheriff shall return *cepi in manus* to the *petit cape*.

But, if there be a default at the day given for battle in a writ of
right, there shall be final judgment without a *petit cape*.

So, there shall be final judgment without a *petit cape* in all cases of
a default after verdict.

If there be a departure in despite of the court.

So, upon a default at the *venire facias* in a *quare impedit*.

(D 6.) Attachment.

An attachment is awarded against a man for a contempt to the
court.

As, in *Chancery*, if a defendant does not appear upon service of a
subpœna. *Vide Chancery*, (D 3, 4.)

So, it goes as an original process in an assise of *novel disseisin*, or of
nuisance.

So, in many writs of *præcipe quod faciat*, if the tenant do not ap-
pear upon the summons, the process shall be continued by attachment
and distress infinite.

An attachment ought to be executed by the sheriff, by taking
pledges

pledges of the party for his appearance, and return of the attachment by pledges.

A.

B.

And if he does not appear afterwards, the pledges shall be amerced.

Or, by attachment of the goods of the party.

The sheriff may attach any moveable goods of the tenant or defendant himself.

So, the sheriff ought to return the certainty and value of the goods; for *per catalla ad valentiam* so much, is not sufficient. *R. Cro. El. 134 Cart. 225.*

And when he attaches goods, he does not return pledges.

And if the party does not appear, the goods attached are forfeited. *Cro. El. 13. Semb. Cart. 225.*

But, a clerk cannot be attached by his goods, but only by his person, or his lands, if he has a lay-fee.

So, a lay-man cannot be attached by his lands, or any parcel of a freehold.

Nor, by a thing fixed to the freehold. *20 H. 7. 13. b. 21 H. 7. 26. b.*

Nor, by a chattel real.

Nor, by his apparel, or horse on which he rides, if he has other goods.

So, the sheriff ought to attach only a single thing, so much as will make the defendant appear; not divers goods, and of great value. *Lut. 1457. So much as is sufficient for the debt. Cart. 225.*

And if he does it, and this appears upon record, trespass lies. *Lut. 1457. Otherwise, if the value be denied, or taken by protestation, whereon the plaintiff demurs; for then the value is not admitted. R. M. 4 Geo. 2. in the Exchequer, int. Swindell and Bretnall.*

(D 7.) *Distingas.*

A *distingas* is a process which issues, if the defendant does not appear at the return of the summons, or attachment; and it is called distress infinite, because it goes till appearance.

And the grand distress, because it is many times awarded instead of the grand cape.

The sheriff upon a *distingas* takes all the moveable goods of the party and the profits of the land from the *teste* of the writ, which issues are forfeited to the king, and estreated into the *Exchequer*, if the party does not appear.

And the sheriff returns *manu capt. per A. unde exit. 20 s., &c.*

B.

If a *distingas* goes instead of a grand or petit cape, and the sheriff returns issues, or *nihil*, and at the return the tenant or defendant makes default, final judgment shall be given.

The issues upon *distingas*'s ought to be estreated the last day of every issuable term. *1 Sal. 55.*

Or, by special rule; but this shall not be done without special cause. *R. 1 Sal. 55.*

The issues returned upon a *distingas* ought to be reasonable, though the writ says, *per omnia terras et catalla.*

And therefore, it is sufficient that he return the profits which may arise after the *teste*, and before the return of the writ. 27 H. 8. 3.

Or, in a personal action, so much as may be the charge of the process.

[The court may order issues to be increased on *alias* or *pluries*, at their discretion, usually five times; the former in *C. B. Barnes*, 418. 420, 421, 422.]

[It is in the discretion of the court, to put a defendant under terms, who moves to have the issues, levied under several *distingas's*, restored to him on his appearance, according to *st. 10 Geo. 3. c. 50. s. 4. (quad vide)*; *Cazalet v. Dubois*, C. P. T. 37 G. 3. 1 Bos. & Pull. Rep. 81.]

[Defendant, before the action commenced, quitted the kingdom, leaving his mother in possession of his house and goods; plaintiff, having served a summons to appear at the house, distrained the goods to compel an appearance, and on an application to the court that the levy should be restored, the proceedings were holden regular. *Staines v. Johannot*, C. P. H. 38 Geo. 3. 1 Bos. & Pull. Rep. 200.]

[It is ordered that on all writs of *distingas* returnable on the last day of term, the plaintiff shall be at liberty at the rising of the court to move to increase issues on the *alias*, or *pluries distingas*, to be issued thereupon on the following day, in case no appearance shall then have been entred. And also, that in like cases where a *distingas* shall be returnable on the last day of term and issues thereupon levied, the plaintiff shall be at liberty at the rising of the court to move for leave to sell such issues to pay the cost of such *distingas* or *distingas's*. *Reg. Gen. C. P. T. 38 Geo. 3. 1 Bos. & Pull. 312.*]

(D 8.) *Venire facias*.

A *venire facias* is in the nature of a summons to bring the party to answer; or, against jurors.

[*Venire facias* left at the defendant's house is good, though he is beyond sea. *Brier v. Lansdown*, in *Sc. M. 1720*, *Bunb. 67.*]

[*Venire facias* was the old process of the court of pleas in the *Exchequer*. *Ibid.*]

As to a *venire facias juratores*, *vide Enquest*, (C 1, &c.)

(D 9.) Judicial Process in a real Action; Summons in *Auxilium*, &c.

As to *petit cape*, *vide ante*, (D 5.)

As to summons *ad warrantizandum*, and other process against a vouchee, *vide Voucher*, (D 1, &c.)

As to process for trial by battle, or the grand assize, *vide Battell*, (A 1, 2, 3.)

As to process for trial in other actions, *vide Enquest*, (C 1, &c.)

As to process for execution by *habere facias seisinam*, *vide Execution*, (A 2.)

By *scire facias* upon a fine, or judgment, *vide Fine*, (E 15.)—*Execution*, (A 6.)

(E) Process in Personal Actions.

(E 1.) Summons.

IN all personal actions for debt, or upon contract, the original process is summons; as, in debt, *detinue*, covenant, &c.
So, in dower.

(E 2.) Attachment.

So, in trespass, and other personal actions *vi & armis*, the original process is an attachment. *Vide ante*, (D 6.)

(E 3.) *Capias*.

Vide Pleader, (2 W 3.)

As to a *capias pro fine*, and *capias utlagatum*, *vide Execution*, (B 1, 2.)
—*Pleader*, (2 W 6.)—*Utlagary*.—*Wales*, (B 2.)
Capias ad satisfaciendum, *vide Execution*, (C 9, &c.)—*Bail*, (R 4.)
Capias si laicus, *vide Statute Staple*, (U 4.)
Tessatum capias, *vide post*, (E 7.)

(E 4.) Judicial Process.

(E 4.) *Levari facias*.] Judicial process in personal actions, by the common law, was by *levari facias*, or *fieri facias*. *Vide Execution*, (C 3, 4, &c.)

A *levari facias* requires the sheriff, *quod de terris et catallis* of the defendant *levari faciat denarios*, &c. *Pl. Com.* 441. a.

And it is in the nature of an original; as, upon a recognizance, &c. by a clerk. *Reg.* 299. b. 300. *F. N. B.* 265. D. *Vide Statute Staple*, (D 3.)

Or, judicial after judgment, against any person, ecclesiastical or lay; for it issues out of the record in the court where the record is resident. *F. N. B.* 265. D.

In all cases where a *levari facias* issues, the land is debtor. *Skin.* 619.

(E 5.) *Fieri facias*.] By the common law, after judgment or a recognizance acknowledged, within the year the plaintiff might have a *fieri facias* (as well as a *levari facias*) which commands *quod de bonis et catallis fieri faciat*, &c. 3 *Cro.* 12. a. *Vide Execution*, (C 4, &c.)

So, a *fieri facias* lies for damages recovered in an assise, as well as in personal actions. *Reg. Ju.* 18. b. 24. b.

In a *quare impedit*, or for arrearages of an annuity. *Reg. Ju.* 25. b. 26. b.

In a writ of ward. *Reg. Ju.* 43. a.

If part be levied by a *fieri facias*, there may be another *fieri facias* for the residue.

So, if the sheriff returns, that he is a clerk, and has no lay-fee, it may be directed to the bishop of the diocese where his benefice lies. *Reg. Ju.* 22. 26. b.

If he be *beneficiat*. in *Hibernia*, it may be to the justices of Ireland. *Reg. Ju.* 43. b.

If the defendant has goods in several counties, the plaintiff may have several *fieri facias*'s for the whole, to each county. *R. Dy.* 162. b.

[If a plaintiff cannot find sufficient effects to satisfy his judgment, the court will order the sheriff to retain for his use, money which he has levied in an action at the suit of the defendant. *Doug.* 231.]

(E 6.) *Elegit.*] So, by the *st. W.* 2. 18. upon a judgment or recognizance, the plaintiff, or conusee, may have process by *elegit*, for all the goods, and a moiety of the lands of the defendant. *Off. Br.* 77. *Co. L.* 289. b. *Vide Execution*, (C 14.)

Though he had a *feri facias*, or other execution, upon which nothing, or only part of the debt, was levied. *Vide Execution* (H).

But, an *elegit* after a *feri facias*, &c. ought to recite how much was levied upon it. 1 *Sid.* 91.

(E 7.) *Testatum capias*, or *feri facias*.] So, if a process be returned *nihil*, there may be another process of the same nature, with a *testatum* of the former writ and return to the sheriff of another county. *Vide Execution* (F).

If the first process requires the appearance of the defendant, the *testatum* does not issue before the *quarto die post* the day of return; for the defendant has till then to appear. 2 *Jon.* 200.

So, the *testatum* does not issue before an entry upon the roll, that there are goods there, &c. and this is the warrant for the writ. *R.* *Hob.* 68.

But, there may be a *testatum fieri facias* immediately after the return of the first writ; for thereby the defendant has no day in court. *R.* 2 *Jon.* 200.

So, the first writ may be returned in course by the attorney, without going to the sheriff. *R.* *Sal.* 589.

So, if judgment be given or affirmed in *Trinity* term towards the end of the term, a *testatum capias* may issue the last day, returnable the first return of *Michaelmas* term; for the judgment relates to the first day of the term, or it may be returnable in the same term. *R.* 2 *Mod. Ca.* 190.

[If a *testatum fi. fa.* be sued out and executed, without an original *fi. fa.* having issued to warrant it, it will be set aside for irregularity, 3 *Term Rep.* 388.]

[But, such an irregularity may be cured on the production of an original *fi. fa.* *Id. ibid. et* 658. *Barnes*, 211.]

[If a judgment be in one county, a *ca. fa.* cannot go into another without a *testatum* previously sued out, or awarded on the roll, 2 *Bl. Rep.* 694.]

For more concerning title *Process*, *vide Accompt*, (E 1.)—*Admiralty*, (E 18.)—*Amendment*, (C 1, 2.)—*Affise*, (B 9.—C 2.)—*Attaint*, (C 2.)—*Audita querela*, (E 1.)—*Certiorari*, (H 1, 2.)—*Chancery*, (D 1, &c.)—*County*, (C 9, 10.)—*Courts*, (P 8.)—*Imprisonment*, (H 1, &c.)—*Information*, (D 1.)—*Leet*, (M 10.)—*Officer*, (G 13.)—*Parliament*, (L 18.)—*Pleader*, (B 7, 8.—V 1, &c.—2 V 1.—2 W 2, &c.—2 X 1. 9.—2 Y 1.—3 E 1.—3 F 1.—3 I 1.—3 K 1.—3 M 2. 24.—3 N 2.—3 O 1.)—*Premunire* (C).—*Prerogative*, (D 73.)—*Quod permittat*, (D 3.)—*Quo Warranto*, (C 2.)—*Retorn* (A).—*Wales* (B 1, 2.—C).

PROCHEIN AMY.

Vide Pleader, (2 C 1, 2.)

PROCLAMATION.

Vide Prærogative, (D 2, 3.)—Copyhold, (R 9.)

Proclamation of a Fine.

Vide Fine, (G 1, &c.)—Estates, (B 25.)

Proclamation of Rebellion.

Vide Chancery, (D 4.)

PROCTOR OF THE CLERGY.

Vide Convocation.

PROCURATIONS.

Vide Tenths (C).

PROFANATION.

Vide Sacraments (F).—Temps, (B 3.)

PROFESSION.

(A) Profession; What shall be.

WHEN a man enters into religion after a time of probation, when he takes the habit, and vows obedience, perpetual poverty and chastity, he shall be said to be professed. *Co. L. 132. a.*

But, of a profession made out of the kingdom, the common law does not take consueance; and therefore, if he be professed in *Normandy*, he may maintain an action in *England*; for the profession cannot be tried. *Co. L. 132. b.*

So, a wife, or an husband, cannot be professed without the consent of the husband or wife. *Ibid.*

(B) The Effect of a Profession.

A Man professed in religion is dead in law, and his son shall inherit to him. *Lit. f. 200.*

And he may have an assise of *mortd'ancestor*. *Co. L. 132. a.*

So, if he be tenant in *chivalry*, his heir shall be in ward. *Co. L. 132. b.*

Warranty shall descend. *Ibid.*

If he be a joint-tenant, the land survives. *Ibid.*

But, profession does not avoid his own grant; as, if tenant in tail makes a discontinuance, the issue shall not have a *formedon* during his natural life. *Ibid.*

So, the wife of a man professed shall not be endowed: for profession is made with the consent of the wife. *Co. L. 132. b.*

So, profession shall not do wrong to a stranger; and therefore, a descent upon a civil death does not take away entry. *Ibid.*

By the *st. 31 H. 8. 6. 33 H. 8. 29. and 5 & 6 Ed. 6. 13.* all persons professed were made able to purchase, sue, &c.

So, the canon law being abolished, which made the disability, the common law takes no notice of him. *R. Sal. 162.*

Vide Abatement, (E 5.—F 1.—H 41.)—Capacity, (D 1.)—Ecclesiastical Persons, (B 2.)

P R O F I T S C A S U A L.

Vide Prærogative, (49, 50.)

P R O H I B I T I O N.

(A) To what Court it shall be.

(A 1.) To the Temporal Court.

IF courts exceed their jurisdiction, a prohibition may be granted to them.

And this to temporal as well as spiritual courts. *F. N. B. 39 H.*

As if a court-baron, county-court, &c. or other inferior court in a city, borough, &c. hold plea of a matter out of the limits of their jurisdiction, a prohibition may be granted. *F. N. B. 45. F. 46. A. B. 2 Rol. 317. l. 25. 30. Vide Courts, (P 15.)*

So, if the cause does not appear to be within their jurisdiction. *2 Rol. 317. l. 40.*

Or, if a single cause of action be divided into several by covin, to give them jurisdiction. *2 Rol. 281. l. 27. 317. l. 25.*

So, if an action in an inferior court be founded upon a judgment in *B. R.* or *C. B.* *1 Rol. 54.*

So, if in such court a foreign matter happens, which cannot be there determined, a prohibition goes to surcease, till it be determined; as in right patent in the lord's court, if the tenant join the *mise*, by battle, vouch a foreigner, &c. *F. N. B. 39 H. 40. A. B. C.*

To the *Cinque Ports*, if they confound law and equity together. *1 Sid. 355.*

Or, proceed for the cause of a suit well commenced at law. *Hard. 475.*

So, a prohibition lies to the duchy courts, and courts of a county palatine, if they hold plea of lands out of the duchy. *R. 2 Rol. 317. l. 55. Hob. 77. 1 Rol. 42. 71. Vide Franchises, (D 1, &c.)*

So, to the *Chancery of Chester*, &c. if it holds plea of a matter not cognizable there. *R. 2 Rol. 318. l. 10. R. 1 Sid. 189. 309. Mo. 916. Cont. 1 Rol. 246. 331. R. acc. 1 Rol. 252.*

Or, if the *Chancery* there grants an injunction where it ought not. *R. 2 Rol. 318. l. 15.*

But

But not to the *Chancery* here. *Dub. Ray.* 227.

So, to the sub-warden of the court of *Stannaries*, if he, as chancellor, directs things pending in the courts of the duchy of *Cornwall*.
2 *Rol.* 314. l. 20.

If the court of *Stannaries* holds plea where it does not relate to tin, and no party is a tinner. 2 *Rol.* 253. 379.

So, to the court of the council of *York*. 2 *Rol.* 316. *H. Mo.* 874. *Pal.* 527.

To the court of the marches of *Wales*. *Ray.* 191. 1 *Rol.* 83. 190. 263. 2 *Rol.* 308. 327.

[To the grand session of *Wales*, if process is served out of the jurisdiction. *Vaughan v. Evans*, T. 11 G. Str. 630. 2 *Ld. Raym.* 1408.]

To the court of honour of the earl marshal, if it holds plea of things determinable by the common law. *R. Ca. Parl.* 61. 67. *Sal.* 553. 4 *Mod.* 128. *Sho.* 353. *Vide* 1 *Sid.* 352.

To the courts of *London*, if they proceed when their jurisdiction is determined. *Sal.* 425. 4 *Mod.* 151. *Skin.* 600.

To the court of *Marshalsea*, if it holds plea in debt upon a judgment in *B. R.* *Sal.* 439.

To the court of Requests. 2 *Cro.* 535. *Godb.* 216. 1 *Rol.* 263. 2 *Rol.* 96. 103.

To the commissioners of appeals for the excise. 5 *Mod.* 271.

To the court of *Exchequer*, if it grants an attachment for a proceeding in *B. R.* *Dub. Sal.* 550. *D.* 1 *Rol.* 252.

To a court by usurpation, without lawful authority. *Sal.* 553.

As, if it usurps visitatorial authority. *Reg.* 40, 41. *Vide post.* (F 11.)

[Naval courts martial, military courts martial, courts of admiralty, and courts of prize, are all subject to a prohibition from the courts of *Westminster-Hall*. *Grant v. Gould*, C.P. T. 32 Geo. 3. 2 *H. Bl.* 100.]

[But the court will not grant a prohibition to prevent the execution of a sentence of a military court martial passed against *A.* who had received pay as a soldier, tho' the proceedings of the court martial appear in some instances to be erroneous. *Ibid.* p. 69. *Vide supra, Admiralty* (G).]

(A 2.) To the Spiritual Court.

So, in the time of *H. 3.* and ever since, prohibitions have been granted to the spiritual court, if it holds plea of a matter, whereof consufance there is not allowed. 5 *Co. de Jure Eccl.* 11. [3 *T. R.* 3.]

In the time of *Ed. 1.* a prohibition was granted to a bishop and his official, and an attachment for holding plea after prohibition. 2 *Rol.* 281. *A.*

So, if any claims spiritual jurisdiction, when he has it not, a prohibition lies. 2 *Rol.* 313. l. 42. *Vide post.* (F 11.)

As, if a collector of the pope holds plea of spiritual things. 2 *Rol.* 281. l. 23. 313. l. 35.

If any one purchases a citation from the pope to appear before the archbishop. *F. N. B.* 44. *J.*

Or,

Or, has a citation to a court out of the realm, a prohibition goes to prevent his answering. *F. N. B.* 44. *H.*

If the archbishop of *Canterbury* claims a concurrent jurisdiction with any bishop of his province; for he cannot have it but as *legatus natus*; which title was abolished with the pope. *R.* 2 *Rol.* 313. *l.* 45. *Hob.* 17.

When it lies to the court of Admiralty, *vide Admiralty*, (*F* 2, &c.)

(A 3.) To restrain a Nuisance.

So, a prohibition lies to restrain a public nuisance. *Semb. Skin.* 625, 6. *Vide Action upon the Case for a Nuisance*, (*D* 4.)

(B) By what Court.

BY *Rot. Parl.* 18 *Ed.* 1. the Chancellor and Ch. Justice have power to determine what pleas ought to be prohibited in causes ecclesiastical. 2 *Rol.* 316. *H.*

And therefore a prohibition to the spiritual court may be granted by the *Chancery*. *F. N. B.* 40. *N.*

So, *C. B.* may grant a prohibition. 2 *Rol.* 317. *l.* 5. 10. *R.* 12 *Co.* 59.

And the *Exchequer*. *Adm. Ca. Parl.* 58. *R. Pal.* 526.

Tho' no plea be depending there of such matter. 2 *Rol.* 317. *l.* 5.

So, the courts of law in *Chester* may grant a prohibition to the spiritual court there, if it exceeds its jurisdiction. 2 *Rol.* 318. *l.* 25.

So, the court of great sessions in *Wales*, to the spiritual court there. *R.* 1 *Sid.* 92. *but the Reporter makes a Qu.?*

So, *B. R.* or *C. B.* may grant a prohibition to the spiritual court in *Chester*, *Lancaster*, &c. tho' the courts there may do it. *Cont.* 2 *Rol.* 318. *l.* 20. *Acc. ibid.* *l.* 25. 317. *l.* 10.

So, to the court of marches in *Wales* if it holds plea of a spiritual matter of which it has not cognisance, tho' the superior court cannot do right. *R.* 2 *Rol.* 313. *l.* 15.

So, to a spiritual court, which holds plea of tithes in *London*; tho' by the *st.* 37 *H.* 8. 12. the jurisdiction in such case is given to the mayor of *London*. *R.* 2 *Rol.* 313. *l.* 25. 2 *Inst.* 659, 660.

Or, if a suit be there by an orphan for a legacy, goods, &c. the cognisance whereof, by custom, belongs to the mayor and aldermen of *London*. *R.* 5 *Co.* 73. *b.* 2 *Rol.* 313. *l.* 10.

Or, against an executor or administrator, for goods which belong to orphans. 2 *Rol.* 313. *l.* 20.

Or, if a suit be for probate of a will, where the probate belongs to the lord of a manor. *Per Popb.* 5 *Co.* 73. *b.* 2 *Rol.* 313. *l.* 5.

So, a prohibition may be granted by *B. R.* to the council of *York*; if they hold plea; of a matter within the jurisdiction of *Durham*. *R.* 2 *Rol.* 314. *l.* 15.

So, if *C. B.* holds plea of lands held of a subject, the lord of the manor may have a prohibition to the justices of *C. B.* commanding them to surcease, and that the demandant sue a writ of right of patent in his court. *F. N. B.* 8. *B.* 39. *H.*

(C) The Nature of a Prohibition.

[IN prohibition, are, 1st, contempt of the crown; and, 2dly, a damage to the party. A suit for it must be brought in a temporal court, and the party prays a prohibition; and whether defendant proceeded or not after the prohibition, and attachment goes to bring him into court. If he has proceeded after the writ delivered, it is a contempt; but still it is a matter examinable, whether the court have jurisdiction or not. If it have not, the court will prohibit finally, and give satisfaction. The party is not to have damages, if they have jurisdiction; but if they have none, they have acted against the prohibition of law, and done the party wrong. *Ede v. Jackson, Fort. 345.*]

A prohibition ought to be granted *ex debito justitiae*. 1 *Sid.* 65. *Per two J. Hide cont. Ray. 92. Per all the J. 3 Jac. 2 Inst.* 607. *Per Keeling, Hide cont. 1 Sid.* 178.

And being intended for keeping every court within its proper jurisdiction, the law, as to prohibitions, cannot be changed but by act of parliament. *R. 2 Inst.* 601.

So, the form of a prohibition cannot be altered but by parliament. 2 *Inst.* 601, 2.

(D) At what Time granted.

WHERE it appears by the libel that the matter was not within the jurisdiction of the spiritual court, a prohibition lies after sentence, or before. 2 *Inst.* 602. 619. 2 *Rol.* 318. *l.* 45. *Sal.* 548. [2 *Bur.* 813. *Cowp.* 424. 3 *Term Rep.* 3.]

So, to a temporal court, it lies after judgment, where the matter appears to be out of the jurisdiction. 2 *Inst.* 602. 619.

Or, after execution. *Ibid.*

So, after sentence and appeal. 2 *Rol.* 318. *l.* 48. 319. *l.* 20. *Agreed, 1 Sid.* 65.

[A prohibition was granted on a libel to charge a man to the repair of the church in respect of a light-house, after sentence, and an appeal to the delegates, *Rebow v. Bickerton, in Sc. T. 1721, Bunb.* 81.]

After an appeal to the arches, and then to the delegates, and sentence affirmed there. *R. 2 Rol.* 24.

[To a court of appeal, where it appears they have no jurisdiction over the subject, even after they have remitted the suit to the court below, and awarded costs against the appellant, and tho' the party applying for the prohibition be the appellant. 1 *Term Rep.* 552.]

So, a prohibition lies after sentence, if the libel be for a thing within their jurisdiction, and a temporal matter becomes incident, and they refuse such proof as the temporal courts allow; as proof by a single witness. *R. Cro. El.* 666. *Mo.* 907. *R. Sho.* 173. 161. 3 *Mod.* 286. *Sal.* 547.

[But where the spiritual court has jurisdiction, or unless the want of jurisdiction appear on the face of the proceedings, and has pronounced sentence, there shall be no prohibition; the remedy being by appeal. 2 *Bur.* 813. *Doug.* 378.]

[If

[If the spiritual court has cognizance of part of the charge only, and not of the rest, the court, after sentence below, will not grant a prohibition. 2 Term Rep. 473.]

[If in a suit for a prestation, defendant pleads there is no prescription, and that is denied; yet there shall be no prohibition till they join issue on the plea, and it appears the prescriptive right will come in question. *Gooche v. Bishop of London*, M. 4 G. 2. Str. 879.]

So, it lies after an appeal, if a thing be litigated upon the appeal, which upon a prohibition was determined by verdict, and then a consultation awarded. R. 2 Sbo. 195.

But generally after an appeal, a prohibition shall not be allowed if the matter be not apparent; for by that the party affirms the jurisdiction. 2 Rol. 319. l. 10.

And if by appeal he may have relief, a prohibition shall not be granted. 1 Rol. 319. l. 30.

So, after sentence a prohibition does not go upon suggestion of a matter which does not appear by the libel. 2 Rol. 318. l. 45. Godb. 164.

As, if a libel be for non-payment of a rate for reparation of a church, a prohibition shall not go, upon a suggestion that foreign disbursements, as for prisoners, &c. are included in the rate. R. Lut. 1022.

If a libel be for defamation in calling *whore*, upon suggestion that the words were spoken in London. R. in Exchequer inter Hedd and Winter, H. 5 Geo. 2. (Reported in Bunbury's Reports, 312.) R. 9 Geo. 1. 2 Mod. Ca. 176.

If a libel be in the Admiralty, after sentence a prohibition shall not go, upon suggestion that the contract was upon land, if it does not appear by the libel. R. 2 Mod. Ca. 194. Vide Admiralty, (F 9.)

[Before sentence, prohibition issues on a suggestion of matter of fact not appearing on the face of the proceedings below; after sentence it cannot be overturned by bare averment of the fact; but if want of jurisdiction appears on the face of the libel, or on the proceedings, it shall issue after sentence. *Smith v. Langley*, M. 10 G. B. R. H. 317.]

[After sentence that the new churchwardens make a rate to reimburse the former. *Dawson v. Wilkinson*, T. 10 & 11 G. 2. B. R. H. 381.]

So, a prohibition does not go to a temporal court after judgment, where it appears upon evidence at the trial that the cause of action arose out of the jurisdiction. R. 2 Lev. 230. but *Qu.* if the party demurred to the evidence, and the demurrer was refused?

Nor, to the Admiralty. 1 Sid. 331, 2.

So, a prohibition does not go upon the *st.* 23 H. 8. for suing out of his diocese after answer and sentence thereon; for the party acknowledged the jurisdiction. R. 2 Rol. 318. l. 40. Adm. P. 1 W. & M. inter Tiler and Mantle, Sal. 548. Vide post. (F 9.)

A fortiori, not after excommunication, and a writ of *excommunicatio capiendo*. R. 12 Co. 77.

So, a prohibition shall not go after a suit is entirely determined; for there is not any to whom it may be directed. *Per cur.* 1 Sid. 166.

[Therefore, tho' where matters are essentially triable at common

mon law, if the party come *before* sentence, the court will grant it for the sake of the trial; yet, if he submit to the trial, he is afterwards too late. *Cowp.* 424.]

[Therefore, where the plaintiff has grounded his libel on a custom, and it is found against him, he shall not have a prohibition. *Id. ibid.*]

So, if a prohibition be granted, and afterwards sentence and an appeal pass, it cannot then be used. *R. 2 Cro.* 429. *Vide post.* (K 1.)

So, a prohibition does not go after a writ of *excommunicato capiendo* against the defendant, tho' the cause appears to be out of the jurisdiction, or is pardoned; for the king's writ shall not be discharged by the prohibition, nor the party delivered by it. *R. 12 Co.* 76.

(E) At whose Instance.

SO, where the court has no jurisdiction, a prohibition may be granted upon the request of a stranger, as well as the defendant himself. *2 Inst.* 607.

So, upon motion of the plaintiff himself, who exhibited the libel. *2 Inst.* 602. 607. *R. 2 Rol.* 312. *l.* 10. *Mo.* 780.

[But if a wife libel to recover her fame, prohibition shall not be granted on the husband's motion. *Tarrant v. Mawr*, *M.* 10 *G. Str.* 576.]

So, a prohibition may be sued by him in the reversion, if a libel be for tythes against his lessee. *Cro. El.* 55. *Mo.* 915.

(F 1.) For what Causes granted.

A Prohibition shall be granted to the spiritual court in all cases where the ecclesiastical judge proceeds in a matter out of their jurisdiction.

Though the temporal court has not cognizance of the matter for which the libel is in the spiritual court; for it is a sufficient cause for a prohibition, that the ecclesiastical court exceeds its jurisdiction. *Godb.* 246, 7. *Vide ante*, (A 2.)—*Post.* (F 11.)

[So, if a churchwarden has had his accounts allowed in vestry. *Nutkins v. Robinson*, *H.* 1727, *Bunb.* 247. *Snowden v. Herring*, *M.* 1730, *Bunb.* 289. *Wainwright v. Bagshaw*, *P.* 7 *G. 2. Str.* 974.]

[The spiritual court may compel the churchwardens to deliver in their accounts; but they cannot decide on them. *3 Term Rep.* 3.]

(F 2.) If Freehold be concerned.

(F 2.) *As a title to lands or tenements.*] In the time of *Ed. 1.* it was enacted, that consuance of pleas *de feodalibus, libertatibus feodaliū, maneriis, advocacionibus ecclesiarum, recognitionibus laicū feodū concernentibus*, belong to the king's courts, and ought not to be sued before the ecclesiastical judge. *2 Inst.* 600.

And if they are, a prohibition lies. *F. N. B.* 40. *I.*

As, if a suit be in the spiritual court *de castris, villis, maneriis, &c.* *2 Rol.* 282. *l.* 20.

So,

So, if a suit be in the spiritual court for inclosing his land next to the church-yard. *Vide post.* (G 3.)

[If the bounds of a church-yard come in question. *Pew v. Creswell*, P. 8 G. 2. *Str.* 1013.]

For a way to the church. *Vide post.* (G 3.)

For the making an entertainment for the parishioners at his house in their perambulation. *Vide post.* (G 3.)

For a seat to which he has title by prescription. *Vide post.* (G 3.)

[If one sued for disturbing a person in his seat at church suggests, that he purchased an ancient house with this seat belonging to it, to him and his heirs. *Witcher v. Chessam*, P. 16 G. 2. *Wilf.* 17.]

[If there are reciprocal prescriptions to a seat in a church; for they adjudge one to be good. *Paxton v. Knight*, P. 30 G. 3. 1 B. M. 314.]

[If one has a prescription to have a seat in a church, and the seats are pulled down without his consent, and new ones built by the ordinary on part of the place where the old one was; tho' he have as much seat as he had before, only not in the same place, it is illegal; and if spiritual court interpose, prohibition lies. *Archer v. Sweetnam*, H. 11 G. *Fort.* 346.]

[So, where the right of election to the office of canon residentiary, a freehold office, is in the dean and chapter, a prohibition shall go to the bishop claiming a right to present by lapse, under pretence of his visitatorial authority. 1 *Term Rep.* 650.]

(F 3.) *To an advowson or church.*] So, if a suit be in the spiritual court concerning the right to an advowson, a prohibition goes:

Or, concerning the right to a presentation. R. 1 *Rol.* 173.

So, after induction, whereby the church is full at common law, a prohibition shall be granted, if a suit be in the spiritual court, upon pretence that the institution was not good; for by consequence the right to the church will be determined by the spiritual law, and all *quare impedit* ousted. R. 2 *Rol.* 282. l. 30. 294. l. 10. *Hob.* 15. 1 *Sid.* 293. R. *Mo.* 861.

Though a *quare impedit* be depending at the same time. R. 2 *Rol.* 294. l. 5.

Though institution was granted after a *caveat* entred, which does not vitiate the institution, except by the spiritual law. R. 2 *Rol.* 282. l. 40. 1 *Rol.* 228.

Or, after a *duplex querela* commenced in the spiritual court by the other party. R. *Mo.* 879.

So, if a suit be in the spiritual court for depriving a clerk, because the institution was not good; for the church will be avoided by it. R. 2 *Rol.* 282. l. 45.

Or, to repeal an institution and induction, because he was presented by simony. R. 2 *Rol.* 292. l. 25.

So, if a presentee to a second benefice without a dispensation, *ex uberiori cautela* obtains a presentation from the king, and the bishop takes time to be advised concerning the institution, pending which B. procures a presentation from the king, and institution and induction upon it; a prohibition shall go, if a suit be against the bishop for his injustice; for this tries the right to the church. R. 2 *Rol.* 293. l. 10.

So,

So, if *B.* be sued for obtaining institution and induction after another was inducted. *R. 2 Rol. 293. l. 5.*

So, if a patron presents after a recovery in a *quare impedit*, and an inhibition is granted by the spiritual court to stay institution; a prohibition goes. *R. 2 Rol. 294. l. 25. 28. 31.*

So, after recovery in a *quare impedit*, if the patron presents, and institution is made, and then upon a *caveat* an inhibition is granted by the spiritual court to the archdeacon not to induct, a prohibition shall go; otherwise all trials by *quare impedit* are ousted. *R. 2 Rol. 294. l. 15.*

So, if a suit be in the spiritual court to repeal a super-institution made after a recovery in a *quare impedit*, and before removal of the incumbent by a writ to the bishop. *R. 2 Rol. 292. l. 45. 1 Rol. 62.*

Or, after induction upon a second institution. *R. 2 Lev. 125.*

So, if institution is delayed for two months, (for which only one month is allowed by the canon,) upon which a *duplex querela* is sued by the patron to prevent a presentation by lapse, and yet the bishop after six months presents by lapse, a prohibition goes. *2 Rol. 294. l. 35.*

(F 4.) To an office.] So, by the *st. Ed. 1.* entitled *prohibitio formata de statuto articulorum cleri (incerti temporis)* (*Rast. Abr. Prohib. 8.*), consueance of pleas of offices, &c. belong to the king's courts, and ought not to be drawn before a spiritual judge. *2 Inst. 600. Vide post. (G 4.)*

And therefore if a suit be in the spiritual court for an office which concerns a spiritual matter, a prohibition goes, for the office is temporal, and the party has a freehold; as, for the office of register of a bishop. *2 Rol. 285. l. 45. 2 Rol. 306.*

Tho' the suit be upon a supposition, that a prior grantee had forfeited his office for recusancy; for the freehold will come in debate. *R. 2 Rol. 285. l. 35.*

So, if a suit be in the spiritual court for the office of chancellor. *R. 2 Rol. 285. l. 50.*

Or, to deprive him; for his patent will be thereby avoided. *Semb. 4 Mod. 27.*

Tho' the deprivation be for his ignorance of the canon law, of which the spiritual court is the proper judge. *R. cont. 2 Rol. 286. l. 2. Cro. Car. 65. Latch, 228. Semb. acc. 4 Mod. 27.*

So, if the suit be for the office of a commissary made by the lessee of a prebend. *R. Ray. 88.*

So, if the ordinary proceeds to deprive the master of a school, who has a fixed allowance, without cause, a prohibition goes. *R. 2 Rol. 283. l. 5.*

Or, to deprive a parish-clerk, chosen by the parishioners; for it is a lay-office. *R. Godb. 163.*

Or, tho' chosen by the parson. *Dub. F. g. 273.* if the cause for deprivation be an offence determinable by the common law, before conviction there. *Semb. F. g. 190.*

[If parish clerk is deprived, another appointed, and the old one libels the new, prohibition lies. *Tarrant v. Haxby, T. 30 & 31 G. 2. 1 B. M. 367.*]

[If one is sued for executing the office of deputy parish-clerk, without licence of the ordinary. *Peake v. Bourne, M. 6 G. 2. Str. 942.*]

But the spiritual court shall proceed against an officer in the ecclesiastical

ecclesiastical court, for an offence contrary to the duty of his office, tho' deprivation may ensue. *Semb. F. g. 190.*

(F 5.) If Chattels or Debts are concerned.

So, by the *ft. Ed. 1.* intitled *Prohibitio*, &c. (*Rass. Abr. Prohib. 8.*) *conuſance de rebus & cauſis pecuniarum, & aliis debitis & catallis, qua non ſunt de teſtamento aut matrimonio*, belong to the temporal court, and ſhall not be drawn before a ſpiritual judge. *2 Inſt. 600. 2 Rol. 218. N.*

And if they are drawn before the ſpiritual court, a prohibition lies. *F. N. B. 40. H.*

And therefore, if a ſuit be there for any goods or chattels, tho' they belong to the church, a prohibition lies; as, if a ſuit be for ornaments, or goods given to the church. *2 Inſt. 492.*

For a bible, ſervice-book, chalice. *2 Inſt. 492. 1 Rol. 255.*

For an image taken out of a church. *2 Inſt. 492.*

For a pope's bull, or other charters or writings granted to a church. *2 Inſt. 492.*

So, if a ſuit be there for the profits of a benefice taken (unleſs it be by ſequeſtration, or authority of the ſpiritual court). *R. 2 Rol. 293. l. 20.*

For trees cut down in the church-yard. *2 Rol. 311. l. 27. Cont. Godb. 259. Acc.* if the ſuit be for damages. *1 Rol. 255.*

For bells taken out of a church; for the property is in the church-wardens, who may have trover. *R. Sal. 547.*

Or, for organs taken out of a church. *R. Rol. 57.*

[So, the court of *B. R.* granted a prohibition to ſtay a ſuit in the ſpiritual court for breaking open a cheſt in the church, and taking away the title-deeds to the advowſon, becauſe only an action of treſpaſs or trover could be maintained in the temporal courts for the recovery thereof. *Gardner v. Parker, B. R. T. 31 Geo. 3. 4 T. R. 351.*]

So, if it be for detaining goods of an inteſtate, whereby he cannot exhibit a full inventory; upon which the defendant pleads property. *R. 4 Leo. 150.*

So, if a ſuit be for a thing, for which damages are recoverable at common law; as, upon a promiſe to pay ſuch a ſum.

Tho' it be to be paid when his daughter ſhall marry. *F. N. B. 44. A.*

If a ſuit be for tythes ſeuered, which a ſtranger afterwards carried away. *Cro. El. 607.*

So, if a ſuit be for proctor's fees, or thoſe of a pariſh-clerk; for it is a temporal duty, for which a *quantum meruit* lies. *5 Mod. 238. 1 Sal. 333. R. 1 Mod. 167. Skin. 589. Doug. 629. (607.) Bunb. 170. 2 Str. 1108.*

So, if it be for register's fees; for the ſpiritual court cannot eſta- bliſh a fee. *R. 1 Sal. 333. 4 Mod. 254.*

So, if a ſuit be for debt, or upon a bond in the ſpiritual court, a prohibition lies. *F. N. B. 40. H.*

Tho' the party acknowledges himſelf indebted, or makes a promiſe to pay in the ſpiritual court. *F. N. B. 41. B. C. E.*

Or, the debt was recovered there, and the plaintiff ſues to have execution. *F. N. B. 41. D.*

Or,

Or, the bond was given to perform a sentence there. 2 *Rol.* 302.
l. 15.

So, if a libel be founded upon a covenant to pay tythes. *Semb.*
1 *Leo.* 10.

So, if a sentence be in the spiritual court, and costs, and afterwards a prohibition is granted, and upon debate a consultation, and then the spiritual court gives costs *de novo* for the delay by the prohibition; for those costs *de novo* a prohibition goes. *R.* 2 *Rol.* 119.

But, for a legacy or marriage-portion, suit may be in the spiritual court. *Vide post.* (G 15. 17.)

So, for costs recovered there. *F. N. B.* 52. *D. M.*

So, for procurations, synodals, &c. tho' a prescription is denied; for they are due *de jure*. *Ray.* 360.

So, if bond be given in the spiritual court for a matter testamentary, or matrimonial. *F. N. B.* 41. *Per Dod.* 2 *Rol.* 160. *Vide post.* (G 15, 16, &c.)

So, for the profits of a benefice taken in time of sequestration. 2 *Rol.* 293. l. 23.

So, if covenant, &c. be mentioned only as incident; but the libel is founded upon an endowment, &c. a prohibition does not lie. *R.* 1 *Leo.* 10.

(F 6.) If the Suit be for a criminal Matter.

So, by the *ft. Ed.* 1. intituled *Prohibitio*, &c. (*Raft. Abr. Prob.* 8.) consufance of pleas of felons, malefactors arraigned, robbers, belongs to the king's court, and shall not be drawn before a spiritual judge. 2 *Inst.* 600.

So, if a suit be there for perjury in a temporal cause. 22 *Ed.* 4. 20. *Bro. Jurisdiction*, 20.

If a suit be *ex officio*, which requires an answer upon oath to a criminal matter. 1 *Sid.* 374.

So, if there be an indictment for an assault with intent to ravish, if a suit be afterwards in the spiritual court for sollicitation of chastity, a prohibition shall go. *R.* *Sal.* 552.

But the spiritual court has jurisdiction for punishment of a crime committed in the spiritual court, and in a cause within their consufance; as, perjury in the spiritual court in a cause of matrimony. 1 *Sal.* 134. *Semb.* 1 *Sid.* 217. *Vide post.* (G 13.)

Forgery of orders. 1 *Sal.* 134. When a suit is there for deprivation. *R.* 1 *Lev.* 138. 1 *Sid.* 217.

Extortion in an officer of the spiritual court. 1 *Sal.* 134.

So, the spiritual court shall proceed for the punishment of adultery, tho' an action for assault and battery be against the defendant for the same fact. *Sal.* 552.

(F 7.) Or, a Matter *contra Pacem*.

So, by the *ft. Ed.* 1. intituled *Prohibitio*, &c. (*Raft. Abr. Prob.* 8.) consufance of pleas of distresses, executions, attachments, *vi laciâ*, arrests, assises, juries, secular customs, belong to the king's court, and shall not be drawn before a spiritual judge. 2 *Inst.* 600.

And therefore if a suit be in the spiritual court for trespass, a prohibition lies. *F. N. B.* 40. *M.* 43. *G.*

Tho' it be for entry into an house, to the intent to commit adultery. *R. 2 Inst.* 606, 7.

For cutting down trees in the church-yard. *2 Rel.* 311. l. 27.

If an archbishop proceeds against a bishop for imprisoning another in a temporal cause. *Cro. El.* 484.

So, if a suit be in the spiritual court for night-walking. *2 Inst.* 606, 7.

(F 8.) If a Remedy be given by Statute.

So, if remedy be given in any case by statute, in a temporal court, a prohibition lies to the spiritual court, if a suit be there. *Co. L.* 96. b.

Tho' the matter be of a spiritual nature; except where the jurisdiction of the spiritual court is saved by the same statute. *Ibid.*

As, if a suit be in the spiritual court for a legacy devised out of lands; for land is not devisable by the *st.* 32 *H.* 8. *Vide post.* (G 17.)

So, if a suit be against *A.* for dilapidations, who claims to be incumbent by the *st.* 12 *Car.* 2. 17. *Semb.* 1 *Sid.* 100.

[Preaching without licence is within the act of uniformity, and therefore prohibition lies to suit in the spiritual court for it. *Herbert v. Dean and Chapter of Westminster*, *M.* 6 *G.* *Fort.* 345.]

[A prohibition lies to a suit for marrying without banns or licence, since the *st.* 26 *G.* 2. c. 33. s. 8. by which it is made felony. *2 Wils.* 79.]

[But prohibition does not lie in a suit in the ecclesiastical court against a quaker for repairs of the church, on *st.* 7 & 8 *W.* 3. c. 34. tho' the act gives a remedy before justices of peace, for the old remedy is not taken away; so in the case of small tythes, *per stat.* 7 & 8 *W.* 3. c. 6. *Screen v. Cockernutt*, *T.* 2 *G.* 2. *Fort.* 347.]

(F 9.) If a Man be cited out of his Diocese.

So, by the *st.* 23 *H.* 8. 9. no person shall be cited out of the diocese, or peculiar where he dwells, unless it be for an offence done by a spiritual judge, or upon appeal; or where the immediate ordinary dare not, or will not convene the party; or be himself, directly or indirectly, party to the matter of the suit; or, by request, (in cases where the civil or canon law allows such request,) intreat his superior to examine or determine the matter, on pain of paying double damages and costs for the vexation, and 10*l.* for every person so cited, &c.

Provided, an archbishop may cite out of the diocese for heresy, if the ordinary consent, or do not his duty.

Provided also, an archbishop may cite any out of his diocese for probate of a testament.

And therefore, any one cited out of his diocese, may have a prohibition before appearance to the suit as well as an action for double damages, &c. *Dub.* 2 *Cro.* 321. *Adm. Cro. Car.* 97.

So, if a man be cited out of a peculiar where he dwells, before the bishop, he shall have a prohibition. *R. Cro. Car.* 162. *Cont. per three J.* 1 *Rel.* 136.

Tho' the court, to which he is cited, be nearer than the court of the place where he dwells. *Pal.* 488.

So, a prohibition lies, where an archbishop claims a concurrent jurisdiction with a bishop, in his province or see, in the diocese of such bishop, and there cites persons in the same diocese, and will not absolve

absolve till he procures the cause to be transmitted to his court; for by such means the statute will be eluded. *R. 2 Rol. 313. l. 45. Hob. 17.*

So, if a cause be transmitted to a superior, who is not the immediate superior; for where transmission is allowed, it ought to be to the immediate superior, and not *per saltum*. *R. Hob. 16. R. 1 Sid. 90.*

So, if he be cited at the suit of the bishop, or archbishop himself. *2 Sho. 146.*

So, if a suit be in the arches, when the defendant dwells in the diocese of *London*, out of the thirteen parishes which belong to the archbishop; tho' it be as near. *R. Hard. 380.*

But if a man resides in the diocese of *W.*, and has lands in his occupation in the diocese of *P.*, he may be cited to the consistory court of the bishop of *P.* for not paying a rate to the church where his land lies; for he is an inhabitant there. *R. 1 Sal. 164.*

So, if tythes are due for land in the diocese of *P.*, and the party removes to the diocese of *W.* and there lives seven years, he may afterwards be cited to the diocese of *P.* *Dub. 5 Mod. 451. R. Sal. 549. Carth. 477.*

So, if a man usually resides out of the diocese, but was in the diocese for trade, &c. and then there cited, it will be good, and no prohibition goes, tho' he afterwards returns to his habitation. *Hard. 421.*

So, if a man be cited to a peculiar, where he lives, tho' it be out of the diocese. *1 Rol. 328. Semb. Skin. 233.*

So, if a suit be for a legacy in the prerogative court, when the testament was proved there, tho' the executor lives in another diocese. *F. g. 110.*

So, if a man, cited to the spiritual court in his diocese, dies *pendente lite*, the executor or administrator may be cited, tho' he dwells in another diocese; for the suit does not abate by the death of the defendant. *R. 2 Cro. 483.*

So, if a suit be against executors, and one of them lives within the diocese, tho' the other is out of it. *1 Rol. 328.*

So, a prohibition does not lie, if a man in the diocese of *London* be cited to the arches; for there is an antient composition between the archbishop and bishop of *London* for such purpose. *R. Cro. Car. 339. Dub. Ray. 91. Semb. Godb. 191.*

Or, if a man within an archdeaconry be sued before the bishop, where the archdeacon, by composition, has a peculiar jurisdiction. *2 Rol. 357. 446. 448.*

So, a prohibition does not lie where a cause is transmitted, upon the request of the inferior judge, to his immediate superior; for to the prohibition such transmission may be pleaded. *Cro. Car. 162.*

And it is sufficient to shew that it was an ecclesiastical cause, without saying what cause in particular. *R. Cro. Car. 162.*

That it was removed upon request, without saying, that the request was under seal. *Ibid.*

And it is sufficient, that the cause be transmitted to the immediate superior, tho' the bishop be passed by; as, if a peculiar belongs to the archbishop, there may be a transmission of a cause to the archbishop, omitting the bishop. *1 Sid. 90. R. inter Johnson and Lee,*

9 *W. 3.* 5 *Mod.* 238.; but no judgment there, tho' it seems that it was afterwards given. *Skin.* 589.

So, it is sufficient to shew a request of the bishop, upon motion, without pleading. *R. 1 Lev.* 225.

But if the transmission be not to the immediate superior, it is not allowable. 1 *Brownl.* 46.

So, a prohibition does not lie for a citation out of his diocese, after submission to the jurisdiction of the court to which he was cited; as, if such court has proceeded to sentence. *R. Cro. Car.* 27. *R. 1 Vent.* 61. 2 *Sbo.* 155. *Vide ante* (D).

Or, if the defendant has pleaded to the libel. *R. Carth.* 33.

Tho' the suit be in the diocese of *London*, and it appears by the libel that the defendant dwells at *Winchester*, which is known to be in another diocese; for the court has not judicial notice of the limits of dioceses. *Carth.* 34.

Yet, if upon the libel itself it appears that the defendant dwells out of the diocese, or be in any other respect out of the jurisdiction of the ecclesiastical court, a prohibition shall go. *Carth.* 33.

So, a prohibition did not lie for a citation out of the diocese to the high commission, which was erected by the *st.* 1 *El.* after 28 *H. 8.* 1 *Rol.* 174.

(F 10.) If a Remedy be given by the Common Law.

So, a prohibition lies, if a suit be in the spiritual court, for a matter for which there is remedy by the common law. *Co. L.* 96. b.

As, for a fact, for which trespass lies at common law. *Vide ante*, (F 5.)

[If executor libels for taking a thing without his consent, which defendant pretends was *donatio causa mortis*; for it may be tried by action of *trover*. *Thompson v. Batty*, T. 13 G. Str. 777.]

(F 11.) If the Spiritual Court has not Jurisdiction, tho' there be no Remedy elsewhere.

So, a prohibition lies, where the spiritual court has no jurisdiction; as, to a suit before the pope's collector *pro lesione fidei*; for the pope's collector has no jurisdiction in this realm. *Bro. Jurisdiction*, 20.

If a bishop, &c. acts as visitor, where he has no visitatorial power. *Reg.* 40, 41. *Sal.* 553. *Vide ante*, (A 2.)

If a court of judicature, erected after the fire in *London*, act after their authority is determined. 4 *Mod.* 151. *Sal.* 425.

(F 12.) If the Spiritual Court allows a Custom, &c. void by Law.

So, a prohibition lies, if a suit be in the spiritual court for a thing not allowed by law; as, if a suit there be founded upon a custom void in law; as, upon a custom, that the inhabitants of such a house ought to find eating and drinking for the parson and churchwardens going in procession in the Rogation. *R. Mo.* 916. 1 *Rol.* 259.

So, if a suit be there for tythes of things, for which none are due by law. *Vide post.* (G 8, &c.)

So, if a suit be for a thing allowed by the civil law, which is not lawful by the common law; for this shall be preferred. *Sti.* 10.

So, if a suit be for a legacy, when upon a legal construction of the will none is due. 2 *Rol.* 414.

[On a libel in the court of dean and chapter, a peculiar, against *A.* for preaching without their licence, the power to license is personal to the bishop or archbishop, not to the ordinary. *Herbert v. Dean and Chapter of Westminster*, *M.* 6 *G.* *Fort.* 345.]

[In a suit by the next of kin, for a distribution of surplus, there being a legacy to the executor. *Hatton v. Hatton*, *P.* 3 *G.* 2. *Str.* 865.]

[If the administrator of an executor is sued for a legacy given by testator. *Tucker v. Towell*, *M.* 9 *G.* 2. *B. R. H.* 185.]

[Custom to pay a fee for churching a woman at the usual time, whether she is churched or not, is void; because uncertain as to the time, and unreasonable, for she may be dead. *Naylor v. Scott*, *P.* 2 *G.* 2. *Ld. Raym.* 1558.]

(F 13.) Or, allows illegal, or disallows legal Evidence.

So, a prohibition lies, if another court determines by improper evidence; as, if the commissioners of appeals for the excise determine by minutes of the evidence, taken by a justice of peace, and do not examine the witnesses *viva voce*. *R.* 5 *Mod.* 272.

So, if in the spiritual court, payment, &c. pleaded, is disallowed, because proof of it is made only by a single evidence. *Cont.* 1 *Rol.* 12. 1 *Sid.* 161. *R. acc.* 2 *Rol.* 414. *R.* 3 *Mod.* 286. 1 *Sho.* 158. *Carth.* 142. *Vide post.* (G 23.)

But there shall not be a prohibition, because the spiritual court requires proof of a negative; as, if to libel for tythes, the defendant pleads that the parson did not read the 39 articles, and the court requires proof of the plea; for it is presumed at law that the parson did read them, if the contrary be not proved. *R.* 1 *Rol.* 83.

(F 14.) Or, tries a Matter triable by Law.

So, a prohibition lies, if the spiritual court proceeds to the trial of a custom, or prescription, which are triable only by the common law. *Carth.* 33. *Vide post.* (G 10.)

If it proceeds to try the limits of a parish, which are triable by the common law. 1 *Rol.* 332.

So, if, upon a libel for tythes, the defendant makes title by a lease; for this is determinable by the common law. *R.* 1 *Rol.* 61.

So, if upon a libel for an account against an executor, he pleads a deed of gift by the testator of his goods to another, and the spiritual court does not allow it. *R.* 1 *Rol.* 123.

If on a libel for tythes due only by custom, the custom is denied. *Per three J. Het.* 13.

So, if it proceeds to swear a parish-clerk, churchwarden, &c. named by the parson, when by custom he should be named by the vestry. *R.* 2 *Gro.* 670.

But, after verdict for a custom or prescription, which allows a jurisdiction in the spiritual court, a consultation goes. *Carth.* 33. *Het.* 13, 14.

So, a prohibition goes, if the spiritual court, in a cause within their jurisdiction, examines to matters *dehors*; as, where a grant of an administration is prayed to be revoked, if the spiritual court examines

him concerning covenants, or what land he has by descent, &c. *Mo.* 906.

In a prosecution in the spiritual court for incontinency, if the spiritual court examines the party upon oath, whether he did the fact alleged. *R. Mo.* 906.

(F 15.) If the Court refuses a Copy of the Libel.

So, by the *st.* 2 *H.* 5. 3. and 2 (or 2 & 3) *Ed.* 6. 13. he that sues a prohibition must deliver to the court a copy of the libel; and therefore, if the spiritual court refuses a copy of the libel, a prohibition lies *quousque*, &c. after which the spiritual court cannot proceed till a copy is granted. *Mod. Ca.* 308. *Sal.* 553. *R.* 4 *Ed.* 4. 37. *b.* *Hard.* 364.

If a prohibition be granted before a libel exhibited, he may afterwards exhibit it, but do nothing *ultra*. *Per Holt, Mod. Ca.* 308.

So, a prohibition shall be *quousque*, for refusing a copy of the articles. *R.* 1 *Vent.* 5. *Mod. Ca.* 87. *Hard.* 364.

And if he be excommunicated for want of an answer before a copy given, the prohibition shall contain a *mandamus* for absolving him. 1 *Vent.* 5. *Ray.* 170. *R.* 1 *Sid.* 403.

And if he has appeared, and is excommunicated for that cause, he shall be absolved without an oath *ad parend. mandatis ecclesiæ*. 1 *Sid.* 232.

So, there shall be a prohibition for refusing a copy of a libel, tho' the proceeding be *ex officio*, as well as between party and party. *R. cont. Mo.* 756. 2 *Cro.* 37. *Semb. acc.* 2 *Cro.* 388. *R. acc.* *Ray.* 170. *R. Mod. Ca.* 87. *Acc. Mo.* 917. *Per Holt, Sal.* 553.

So, there shall be a prohibition, if the libel exhibited does not ascertain the offence; as, if it be for *certain offences*. *Hard.* 364.

So, after a prohibition for refusing a copy of the libel, if a copy be granted, he may have another prohibition upon the merits. *R. Mo.* 917.

But if a copy be granted, the first prohibition shall be discharged *ipso facto* without a writ of consultation. *Mod. Ca.* 308.

And therefore, there cannot be a prohibition for denying a copy of the libel, and upon the merits, together; for if the prohibition for refusal of a copy be discharged, by the granting it, there may afterwards be a prohibition upon the merits. *R. Mod. Ca.* 308.

So, if a prohibition for refusing a copy of a libel be absolute, it shall be discharged by a *superfedeas*. 1 *Vent.* 5.

So, a prohibition for refusing a copy ought not to be granted ill an *affidavit* of the refusal. 1 *Vent.* 252.

(F 16.) If a Parson, &c. does Waste.

So, a prohibition goes to prevent damages to any ecclesiastical possession; as, if any does waste in the houses of a parson, *R. Mo.* 917. 1 *Rol.* 86. 167.

Or, cuts down trees growing upon his lands. *Mo.* 917. *R.* 1 *Rol.* 335.

Tho' it be for iron-works, or other uses, except the repair of the church. 1 *Rol.* 335.

So, if a parson, after a recovery against him in a *quare impedit*, continues in possession, and commits waste. *Ibid.*

So,

So, if the vicar cuts down a tree in the church-yard. 2 *Rol.* 111

[The court of *Common Pleas* has no power to issue an original writ of prohibition to restrain a bishop from committing waste in the possessions of his see; at least at the suit of a stranger. *Jefferson v. Durham*, C. P. M. 38 *Geo.* 3. 1 *Bos. & Pull. Rep.* 105. *Semb.* That no court of common law has that power. *Ibid.* *Quere*, If the court of Chancery has that power? *Ibid.*]

(F 17.) Prohibition *quoad*, &c.

So, if a suit be in the spiritual court for a matter within their conu-
fance, mixed with matter of which the court has no jurisdiction, a
prohibition shall go *quoad* the part of which it has no jurisdiction.
R. Mo. 873. *Sti.* 10. 1 *Sid.* 251.

As, if in a suit for tythes, the sentence be for the treble value, there
shall be a prohibition *quoad* the treble value. *R. Mo.* 873.

So, if a suit be against a bishop for granting institution and in-
duction, after a *duplex querela* against him, there shall be a prohibition
quoad the repeal of the institution, not *quoad* the contempt. *R.*
Mo. 879.

(G) When a Prohibition shall not be granted.

(G 1.) When the Spiritual Court has Jurisdiction.

(G 1.) *As if the suit be* BUT a prohibition does not lie, if the
circa mere spiritualia.] spiritual court proceeds only for a matter
within their jurisdiction.

By the *st. de circumspecte agatis* 13 *Ed.* 1. the court Christian shall
hold plea of things mere spiritualia, notwithstanding the king's pro-
hibition; as, for penance, corporal or pecuniary, *pro peccato mortali*.

And, therefore, the spiritual court may punish, by ecclesiastical
censures, apostasy, heresy, blasphemy, schism, &c. 5 *Co.* 9. a. *De*
Jure Eccl. 2 *Inst.* 488.

So, fornication, adultery, &c. 5 *Co.* *De Jure Eccl.* 9. a.

Incest, or solicitation of chastity. 5 *Co.* *De Jure Eccl.* 9. a. 2 *Inst.*
488.

Suspicious living without marriage. *R. Jon.* 259.

So, adultery, &c. tho' the husband had an action for an assault
upon his wife. *Per Holt*, *Sal.* 552.

Neglect to resort to church for divine service. 1 *Sal.* 166. *Mod.*
Ca. 189.

So, if a man does not resort to the parish church. *Dub.* 1 *Sal.* 166.
Mod. Ca. 189. *Vide infra.*

If he resorts to an unlawful conventicle; for false worship is with-
in ecclesiastical conu-*fance.* *R.* 2 *Vent.* 44.

So, the granting of orders belongs to the spiritual court. 2 *Inst.*
488. 5 *Co.* *De Jure Eccl.* 9. a.

So, the granting of a licence *ad prædicandum.* *Vide infra.*

And a prohibition shall not go, tho' it be to him who has a donative.
R. 1 *Mod.* 90. 2 *Keb.* 876. *Vide infra.*

So, the admission and institution of a clerk are within the jurif-
diction of the spiritual court. 5 *Co.* 9. a. *De Jure Eccl.*

So, simony is within the jurisdiction of the spiritual court; and if a suit be there to punish it, a prohibition does not lie. 2 Rol. 292. l. 40. Mo. 914. 5 Co. 9. a. *De Jure Eccl.*

Tho' the suit be after a presentation to the church upon the simoniacal contract. R. 2 Rol. 292. l. 40.

So, if a parson be by simony, and he sues in the ecclesiastical court for tythes, and the defendant pleads that he is *simoniacus*, a prohibition does not lie. Semb. Mo. 777.

So, the celebration of divine service is of spiritual consufance. 5 Co. 9. a. *De Jure Eccl.*

And therefore, if the spiritual court proceeds to punish the neglect of the celebration, a prohibition does not lie. Co. L. 96. a.

Or, if it proceeds by libel for not taking the communion in his parish-church. Hard. 406.

Tho' he pleads that he received it *alibi*; for the spiritual court is judge of it. R. Hard. 406. R. cont. Skin. 101.

So, if the libel be, that he did not resort to his parish-church. Semb. 2 Rol. 438. 455. *Vide supra.*

So, if the spiritual court proceeds against any one because he preached without licence, a prohibition does not go. *Vide supra. Vide F 8. contra.*

Tho' it be by the incumbent of a donative. Semb. 1 Mod. 90. *Vide Donative.—Vide supra.*

[To a suit for baptizing, and performing other ministerial offices in the parish of A. without licence from the bishop. *Campbell v. Aldrich*, T. 30 & 31 Geo. 2. 2 Wils. 79.]

[To a suit for *brawling* or *smiting* in a church or church-yard, tho' there has been no previous conviction at law; for that relates only to striking with a weapon, or drawing it to strike. *Wilson v. Greaves*, H. 30 Geo. 2. 1 B. M. 240.]

So, if the spiritual court proceeds for defamation of the common prayer. 2 Mod. Ca. 338.

So, for defamation of the church established in England. 2 Mod. Ca. 338.

So, the instruction of youth is within their consufance; and therefore a prohibition does not lie upon a libel for teaching school without licence. 1 Mod. 3. Unless they demand the penalty by the statute. R. 2 Lev. 222.

[Masters of grammar-schools must be licensed by the ordinary, who may examine a party applying for a licence as to his learning, morality, and religion. *Rex v. York*, M. 36 Geo. 3. 6 T. R. 490.]

(G 2.) *For the repair or ornaments of the church.*] So, by the st. 13 Ed. 1. *de circ. agat.* the court Christian shall hold plea for not repairing or adorning the church, or not inclosing the church-yard. 5 Co. 9. a. *De Jure Eccl.*

And therefore, if a suit be there for not repairing the nave of the church, a prohibition does not lie. F. N. B. 50. N. 2 Inst. 489. R. 5 Co. 67. *Jeffreys*. R. 1 Mod. 194. 236.

And if a suit be for not repairing of the church generally, a prohibition does not go; for it shall be intended only *pro nave ecclesie*. 1 Mod. 236.

So, if a suit be for not providing ornaments agreed by the vestry; as, more bells, &c. R. *Popb.* 197. [No

[No prohibition lies to suit of the ordinary to deface ornaments (as arms) set up in a church without his consent. *Palmer v. Bishop of Exon. M. 10 G. Str. 570.*]

[If in a dispute before the ordinary about erecting a monument, one appeals to the arches, such appeal lies, and no prohibition shall go. *Cart v. Marfb, M. 11 Geo. 2. Andr. 69.*]

Or, for not repairing a public chapel, which belongs to a church. *2 Inst. 489.*

So, if a suit be against a parson or impropriator, for not repairing the chancel. *1 Mod. 260. 2 Mod. 259.*

Tho' the ecclesiastical court proceeds to sequester the profits of the impropriation for such intent. *Per three J. North dub. 1 Mod. 259. R. cont. 2 Mod. 259.*

Tho' it be suggested that he was overcharged; for he may have remedy upon an appeal. *R. 2 Rol. 289. l. 40.*

Or, that all the parishioners are not rated. *Cont. 2 Rol. 291. l. 12. R. acc. 2 Rol. 290. l. 15. R. 1 Vent. 308.*

Or, that he has been exempted for sixty years; for he ought to shew his exemption. *R. 2 Rol. 290. l. 10.*

Or, that he repairs a chapel of ease in the same parish. *2 Rol. 311. l. 20. 1 Rol. 126.*

Tho' a small matter be inserted in the same rate, other than for the repair of the church; as, for the prisoners of *B. R. Lut. 1023.*

So, if a rate be by vestry of a parish for the repair of a church, the spiritual court may enforce the payment. *1 Mod. 194. R. 2 Mod. 8.*

So, if a rate by commission of the ecclesiastical court, or by some parishioners, be confirmed by the vestry. *1 Mod. 194.*

So, if a rate for enlarging or rebuilding the church. *1 Mod. 236. R. 2 Mod. 222.*

[So, on a rate made for erecting galleries, said in the libel to be rated according to an ancient and standing rate, and to be *perpetua futur. temporibus. Forty v. Owbear, Fort. 346.*]

So, if a suit be for a rate assessed upon the hall of a company in London in the same parish. *R. 2 Jon. 187.*

[In a suit for removing the reading-desk, where the judge was the person that read prayers, and the sentence by default, prohibition denied; for no difference between sentence by default or on hearing; and no prohibition after sentence, for there may be an appeal; and so, if a man judge in his own cause. *Owen v. Hughes, M. 7 G. Fort. 199.*]

[If in a cause to obtain a faculty to erect an organ, there is a citation to the parishioners to shew cause, the court will not grant prohibition, on a suggestion that the ecclesiastical court are about to try a custom; for the citation was nugatory, the parishioners consent being unnecessary, and the prohibition would be immaterial. *Butterworth v. Barker, P. 5 G. 3. 3 B. M. 1689.*]

But a prohibition lies, if a man is charged to the repairs, who, by custom or law, ought to be exempted. *2 Rol. 289. H. 290. I.*

Who shall be exempt or not, *vide Escliffe, (G 2.)*

So, if the charge is expressly to the repair of the chancel as well as *navis ecclesie. 1 Mod. 236.*

If a libel be for non-payment of a rate made for repairs by a commission

mission out of the ecclesiastical court, without consent of the vestry. *R. 2 Mod.*-8.

So, a prohibition does not lie for a suit for the not finding descent ornaments in the church. *2 Inst.* 489. *Lutw.* 1023.

Who shall find ornaments, *vide Esglise*, (G 2.)

Nor, to a suit for a faculty to have a seat *in nave ecclesie*. *God.* 200. *Vide post.* (G 3.)—*Esglise*, (G 3.)

Nor, to a suit for a way to a church, if the prescription, or right, to it is not denied. *Semb.* *2 Rol.* 41.

But a prohibition lies upon a suit for ornaments, when he was not a parishioner. *R. 2 Rol.* 262. 270.

Or, if charged by a rate upon his land; for it is a personal duty. *2 Rol.* 262. 270.

[The ordinary cannot punish a single trespass in the body of the church, if it does not hinder divine service; as, for making a hole in the church-wall, or cutting the boughs of a yew-tree in the church-yard. *Bensted v. Collins*, *P.* 1727, *Bunb.* 229.]

(G 3.) *For not inclosing the church-yard, &c.*] So, a prohibition does not lie if a suit be there for not inclosing the church-yard. *2 Inst.* 489.

Nor, for a nuisance, or other matter done in the church-yard. *R. Carth.* 152.

But a prohibition lies, if a suit be in the spiritual court to enforce any one, bound by prescription, to maintain the fence of his land next to the church-yard; for this is a charge upon a temporal inheritance. *2 Rol.* 287. *l.* 35.

[Prohibition lies to a suit to shew cause why licence should not be granted to build a charity-school in the church-yard. *Saint George Hanover Square v. Stewart*, *H.* 13 G. 2. *Str.* 1126.]

Or, for an erection upon his soil, not part of the church-yard, tho' he stops the lights of the church. *R. Carth.* 152.

So, it lies, if a suit be there *ex officio* for a way to the church. *R. 2 Rol.* 287. *l.* 1. 5.

Or, for finding entertainment for the parishioners, in his house, in their perambulation. *R. 2 Rol.* 287. *l.* 15.

So, a prohibition does not lie upon a suit for dilapidations. *5 Co.* 9. *a.* *De Jure Eccl.*

Nor, to have a faculty for a seat *in nave ecclesie*. *Godb.* 200. *Vide ante*, (G 2.)

Or, for enjoyment of a seat which he claims by a prescription, if the other, who prays the prohibition, does not insist also upon a prescriptive right in himself. *R. Sal.* 551.

But if a libel be in the spiritual court for a seat, where the other by prescription has enjoyed and repaired it, a prohibition lies. *Vide Esglise*, (G 3.)

So, if the ordinary direct a seat to *A.* and his heirs, without restriction to the time that they continue parishioners, it will be bad, and a prohibition goes. *R. 2 Rol.* 24.

(G 4.) *For admission to a spiritual office.*] So, a prohibition does not lie, if a suit be in the spiritual court, for admission to a spiritual office; as, for swearing churchwardens chosen, according to the *can.*

3 *Jac.* 89. which directs, that one shall be named by the minister, the other by the parishioners. *Vide ante*, (F 4.)

To swear churchwardens to do their office generally. *R.* 1 *Vent.* 127. 2 *Mod.* 278.

[To a libel for not taking on him the office of chapel-warden, prohibition does not lie, tho' the church be a donation. *Casle v. Richardson*, *M.* 13 *G. Str.* 715.]

So, if a suit be for having been admitted to deacon's orders before the age of twenty-three, or to priest's before twenty-four years; tho' this be prohibited by the *st.* 13 *El.* 12. *R.* 3 *Mod.* 67.

So, a prohibition does not lie, if there be a libel to compel churchwardens to do their duty; as, to render an account according to the *can.* 3 *Jac.* 89. where they refuse to account. *Adm.* 2 *Rol.* 71. 2 *Jon.* 132.

But if the spiritual court will swear both churchwardens chosen by the parson upon some antient canon, and refuse him chosen by the parishioners, a prohibition goes. *R.* 2 *Rol.* 287. *l.* 25.

So, where by custom the parish chooses both, and the spiritual court will admit one chosen by the parson. *R.* 2 *Rol.* 287. *l.* 30.

So, if a suit be there, to compel the churchwardens to account there, where by custom they ought to account before twenty-four heads of the parish. *R.* *Lut.* 1029.

Or, to compel an oath to do a thing out of their office. *Semb.* 1 *Vent.* 114. 127. *Vide Esglise*, (F 1.)—*Serement* (B).

Or, to compel one to be sworn, who has a privilege to be exempted. *Pal.* 392.

Or, to compel an account in the spiritual court, after an account before the minister and parishioners, according to the *can.* 3 *Jac.* 89. without cause. *R.* 2 *Rol.* 71. *Adm.* 2 *Jon.* 132. *R.* *M.* 4 *Geo.* 2. in *Exchequer*, *inter Snowden and Herring*. *Vide Esglise*, (F 2.)

So, if by custom the parishioners choose a parish-clerk, and a libel be to establish another, chosen by the parson according to the canon, a prohibition goes. *Godb.* 163.

Tho' the libel be against him for a collateral matter, which supposes him no clerk. *Ibid.*

[If there is a suit for removing a parish-clerk, and punishing him for immoralities punishable by the temporal laws, there may be a prohibition as to all but the deprivation, but not as to that. *Townsend v. Thorpe*, *T.* 13 *G. Ld. Raym.* 1507. *Str.* 776.]

(G 5.) *For tythes.* Tho' the suit be for a right under a fourth part of the value of the church.] Conusance of the subtraction of tythes, by a parishioner from the parson, belonged originally to the spiritual court. *Semb. cont.* 2 *Inst.* 489. *Acc.* 2 *Inst.* 363. 490. *Vide Disines*, (M 2.)

Not the conusance of the right to tythes. 2 *Inst.* 489. 661.

But now, by the *st.* *Circ. agat.* 13 *Ed.* 1. *art. Cl.* 9 *Ed.* 2. 1, 2. the court Christian shall hold plea of the right, as well as of the subtraction of tythes, if a fourth part of the value of the church be not demanded.

By the *st.* 27 *H.* 8. 20. and 32 *H.* 8. 7. any person, ecclesiastical or lay, may convene for subtraction of tythes before the ecclesiastical judge.

And by a proviso in the *st.* 32 *H.* 8. and 2 & 3 *Ed.* 6. 13. a suit for

for such subtraction shall be before the ecclesiastical judge, and not before any other judge.

So, by the *st.* 2 & 3 *Ed.* 6. 13. if predial tythes be carried away without being set out, &c. the party may sue for the double value before the ecclesiastical judge, according to the ecclesiastical laws.

And therefore, in all cases where a suit lies by spoilation in the spiritual court for the right to tythes, no prohibition shall go; viz. where the right to the patronage or presentation cannot come in debate. *F. N. B.* 37. *E.* 51. *C.* *Vide Difmes*, (M 1.)

But where the right of patronage may come in debate, a prohibition goes; for their spoilation does not lie; as, if the defendant does not claim by institution. *Vide Difmes*, (M 1.)

Or, claims by the presentation of another patron. *Vide Difmes*, (M 1.)—*Ante*, (F 3.)

Or, above the fourth part of the value of the church. *Vide Difmes*, (M 1.)

(G 6.) *Or, if it be between spiritual persons.*] So, if a suit be in the spiritual court for tythes, where the question is, Whether they belong to the parson or the vicar? no prohibition goes; for both are spiritual persons. *R.* 2 *Rol.* 310. *l.* 25. 2 *Rol.* 55. 2 *Bul.* 157. 1 *Leo.* 94. 128.

[As, in a libel against a parishioner for tythe of turnips; who pleads a custom to pay to impropriator.]

Or, whether they belong to the parson or the chantor. *R.* 2 *Rol.* 310. *l.* 25.

Tho' one of them claims by letters patent. *R.* 2 *Rol.* 310. *l.* 45.

So, if a suit be between the vicar and the lessee of the impropriator. *Dub. F.* g. 79.

So, if a suit be by a parson against an impropriator being a layman, where the question is only, whether they are great or small tythes.

Tho' the impropriator insists that by custom the land ought to be sown with corn. *R.* 2 *Rol.* 310. *l.* 50. 311. *l.* 35. 312. *l.* 30.

Or, if a suit be for a portion of tythes in the parish of *B.* and the parson of *B.* claims *pro interesse suo*. *R.* 2 *Rol.* 312. *l.* 20.

Tho' the bounds of the parish be in dispute. *R.* 2 *Rol.* 312. *l.* 30.

So, if a suit be against *A.*, being a parishioner, for a portion of tythes, or upon a *modus*, who insists that it belongs to the vicar, or *vice versa*. *R.* 2 *Rol.* 311. *l.* 10. *Mo.* 907. *Godb.* 50.

Or, to him, by a lease from the vicar. *R.* 2 *Rol.* 310. *l.* 30.

Or, to the vicar, by endowment of the parson. *R. cont.* 7 *Car.* but *R. acc.* 11 *Jac.* 2 *Rol.* 310. *l.* 35. *Semb. cont.* *Mo.* 780.

[If the archdeacon sues for procurations, tho' against a curate, where there is a rectory impropriate, and no vicarage endowed. *Sanderfon v. Clagget*, *P.* 7 *G.* *Str.* 421.]

(G 7.) *Or, if the suit be upon subtraction of tythes, &c.*] So, if a suit be in the spiritual court for tythes subtracted or detained, no prohibition goes. *Vide Difmes*, (M 2.)

Tho' the parishioner alleges a custom to take back thirty sheafs of tythes severed, without more. *Semb. Godb.* 234.

Tho'

Tho' the parishioner severs his tythes, and afterwards carries them away. *Mo.* 912. *Cro. El.* 607.

Tho' the parishioner has made a composition for them by *parol*, if there be not a lease for life, or for years. *R. Carth.* 70.

So, if the suit be for a *modus*. *Latch*, 125. 3 *Bul.* 241.

Or, for tythes due only by custom. *Pal.* 380.

(G 8.) *Except where no tythes are due. As, where a thing by law is not tythable.*] But if a suit be in the spiritual court for tythes of things, for which no tythes are due *per legem terra*, a prohibition goes. *R.* 1 *Rol.* 379. 1 *Rol. Abr.* 635. *C.* 641, 642. 644, &c. *Seld. de Dec. ch.* 14. f. 3. *Vide Dismes*, (M 9.)

Or, for tythes of barren land, exempted for seven years by the *st.* 2 & 3 *Ed.* 6. 13.

Or, for tythes *in specie*, where a personal tythe only is due. 2 *Cro.* 523, 524.

So, if the suit be for tithes of a prebend from a bishop, who prescribes (as he may, being a spiritual person) *in non decimando*. *R.* 1 *Rol.* 264.

Or, for tythes from a parson, for his glebe, to the vicar. *R. Cro. El.* 578. *Vide ante*, (G 6.)

So, if a suit be for tythes due by custom, where the custom is denied, a prohibition goes till verdict for the custom. *R. Het.* 13.

(G 9.) *Or, is discharged by statute.*] So, a prohibition shall go where a suit is in the spiritual court for tythes of lands discharged by the *st.* 31 *H.* 8. 13. *Vide Dismes*, (M 9.)

Tho' the plea be double, or informal; for if no tythes are payable, a prohibition goes. *Semb. F. g.* 191.

(G 10.) *Or, by a modus decimandi.*] So, where the suit is for tythes in kind, when a parishioner prescribes in *modo decimandi*.—What *modus* is good, *vide Dismes*, (E 10, &c.)

Or, when the suit is upon a *modus decimandi*, and the *modus* is denied. *Latch*, 210.

Or, a different *modus* alleged. *R.* 1 *Rol.* 419. 1 *Vent.* 32.

[A prohibition cannot be granted on a suggestion of a *modus*, till the *modus* is pleaded below. *Stone v. Harwood*, *H.* 10 *G.* 2. *B. R. H.* 357.]

[If a man libels for tythes in kind, and defendant insists on a *modus*, but permits the spiritual court to proceed to sentence, he is too late to apply for a prohibition. *Offley v. Whitehall*, *M.* 1717, in *Sc. Bunb.* 17.]

So, tho' the parishioner prescribes that the parson shall have every tenth ridge of land *incipiendo ab ecclesia*, and afterwards by covin omits to sow those ridges; for that does not entitle the parson to tythes in kind; but he shall have an action upon the case for the fraud. *R. Mo.* 913.

Tho' the suit be by the vicar, and a *modus* is alleged to be paid to the parson. *R.* 1 *Sid.* 332.

So, where *A.* claims a portion of tythes in *B.*'s parish by prescription, and *B.* sues in the spiritual court for them; for the prescription is a temporal matter. *Per two J. Godb.* 45. *Vide ante*, (G 6.)

So,

So, if the defendant in the spiritual court claims the tythes by a lease; for the validity of the lease is determinable by the common law. *R. 1 Rol. 61. Vide ante, (F 14.)*

So, if the defendant lives within an hamlet, where there is a chapel of ease, and out of his tythes maintains a clerk there, and pays a certain sum by prescription to the parson for the residue. *R. 4 Leo. 24, 25.*

So, if the suit be for tythes against *B.*, who pleads that he set out his tythes, and the plea is disallowed, because he did not give notice of the severance to the parson. *Carth. 143.*

If the suit be against the vendee of hay, corn, &c. after severance; for they are due from the occupier of the lands, who sold it. *R. 2 Rol. 78.*

If in a suit for tythes for wool, the defendant alleges a custom to pay at *Lammas*, and the spiritual court disallows it. *R. Cro. El. 702.*

So, if the suit be for tythes, where a composition is made for them between the parson and parishioners for life or years.

Tho' the composition be by *parol*, if it is not determined. *Semb. cont. Carth. 70.*

Tho' the composition be with *A.*, his executors and assigns, during the life of the parson, and *A.* afterwards leases to *B.* at will, and the parson sues *B.*; for he has a remedy by law upon the contract against *A.*, tho' not against *B.* *R. Pal. 377.*

Otherwise, if the agreement amounts only to a covenant, not to a lease or composition. *2 Rol. 121.*

[If a *modus* is pleaded to a libel for tythes by the vicar, and the defendant applies for a prohibition, on a suggestion that the tythes are due to the impropriator; yet, if it appears that they are examining witnesses below to the *modus*, prohibition shall go. *Hood v. Hebden, H. 9 G. 2. B. R. H. 203.*]

[If ecclesiastical court refuses a plea of *parol* agreement with the agent of impropriator for purchase of the tythes, the corn being then severed, prohibition goes. *Chave v. Calmel, P. 6 G. 3. 3 B. M. 1873.*]

[If a *modus* be not proved as laid by the plaintiff in a suit in prohibition, there must be a verdict for the defendant. But if any *modus* be found, tho' different from that laid, that is a ground for the court to refuse a consultation. *Broch v. Richardson, B. R. M. 27 Geo. 3. 1 T. R. 427.*]

(G 11.) *For oblations, mortuaries, pensions.*] So, by the *st. Circ. agat. 13 Ed. 1. & art. Cleri. 9 Ed. 2. 1.* the court Christian shall hold plea for oblations, obventions, mortuaries, pensions. *5 Co. 9. a. De jure Eccl.*

Oblations comprehend the customary payments of every communicant, or for marriages, christenings, churchings, or burials.

By custom, in many places, *2 d.* is due as an oblation for every communicant at *Easter*, and in *London* *4 d.* for each house.

By the *st. 2 & 3 Ed. 6. 13.* every person, who ought to pay his offerings, shall yearly pay them to the parson, &c. where he dwells, at the four offering days accustomed for four years past, or otherwise at *Easter*.

And

And if a suit be for those oblations in the spiritual court, a prohibition does not lie.

But a prohibition goes, if, by custom, nothing is due for oblations.

So, if a suit be in the spiritual court for a mortuary due by law, a prohibition does not lie. *Dub. Garth. 97.*

But by the *ſt. 21 H. 8. 6.* none, on pain of 40*s.* and the value of the sum taken, shall take any mortuary, or any thing for it, but in places where mortuaries have heretofore been used to be paid.

And then no mortuary shall be demanded, where the moveable goods of the deceased are under ten marks.

And no more than 3*s.* 4*d.* where his moveable goods are ten marks value, clearly above his debts, and under 30*l.*

And no more than 6*s.* 8*d.* where, at his death, his moveable goods are 30*l.* value, or more, above his debts, and under 40*l.*

And no more than 10*s.* of what value soever his goods be.

And that no person pay more than one mortuary, and that at the place of his most dwelling or habitation.

And that no mortuary be paid for a *feme-covert*, child, or any not a housekeeper, nor any wayfaring man, not having residence where he dies, whose mortuary shall be paid at the place where he mostly dwelt.

Provided, that the bishops of *Bangor, Landaff, St. David, St. Asaph,* and the archdeacon of *Chester*, may take such mortuaries of the priests in their dioceses or jurisdictions, as have been accustomed.

Provided, that where less than the rates beforeſaid hath used to be paid, no more shall be paid than usual.

And therefore, upon a suggestion, that no mortuary is due by custom; and that a plea of it was denied in the spiritual court, a prohibition goes; for the custom shall be such as is allowed by the common law. *R. Lutw. 1069. Semb. 3 Mod. 268. R. Cro. El. 151. Dub. Cro. Car. 238.*

But if a suit be for a pension in the spiritual court, a prohibition does not go. *F. N. B. 51. B. 2 Inst. 491. 2 Sho. 97. 1 Vent. 120. R. 2 Cro. 217.*

And shall be disallowed in all cases where a pension is claimed by the ordinance of the ordinary, as a judge; for the suit for it ought to be there. *Cro. El. 675.*

So, if the pension commenced by grant of the patron and ordinary, tho' annuity lies for it; for it may be sued for in the spiritual or temporal court. *Cro. El. 675.*

Or, if it be claimed by prescription. *F. N. B. 51. B. Cont. 2 Inst. 491. Acc. 1 Sid. 146. 1 Vent. 3. 120. 265. 1 Sal. 58.*

Tho' the prescription be alleged, as is usual in the ecclesiastical court, only for forty, fifty, or sixty years. *R. 2 Cro. 666.*

So, a prohibition does not go, tho' the suit be in the spiritual court before a demand; yet the *ſt. 34 H. 8. 19.* says, *if wilfully denied.* *R. 2 Rol. 300. l. 45.*

A fortiori, if the suit be there for a pension between spiritual persons. *R. Godb. 196.*

So, a prohibition does not go, tho' the pension commenced upon an appropriation by the pope's bull; tho' by the *ſt. 28 H. 8. 16.* bulls of the

the pope are now void; for this was only inducement to the title, which subsists by the grant of the pension. *R. 2 Lev. 251.*

So, a prohibition does not go to a suit there for proxies, &c. by prescription or grant; for by the *st. 34 H. 8. 19.* the ecclesiastical jurisdiction is saved. *Hard. 181.*

But a prohibition goes, if the prescription be denied. *1 Vent. 265.*

If he ever had sued for it by a writ of annuity. *F. N. B. 51. B. Godb. 196.*

If it be granted by deed. *Semb. 2 Inst. 491.*

If it be claimed by one who cannot prescribe; as, a curate of a chapel of ease; for he is removeable *ad libitum.* *Sal. 506.*

(G 12.) *For violence to a clerk.]* So, by the *st. Circ. agat. 13 Ed. 1.* the court Christian shall hold plea of violence to a clerk; and therefore, if a suit be there to punish by ecclesiastical censures *pro salute animæ*, a violence done to any one *infra sacros ordines*, no prohibition lies. *F. N. B. 51. K. 52. F. 2 Inst. 492. Sal. 548.*

But if a clerk sues in the spiritual court for an assault, after an action by him, tried at the common law, and a verdict against him, upon *son assault demesne* pleaded, if the defendant pleads *son assault* in the spiritual court, and the plea is refused, a prohibition goes. *Semb. Skin. 20.*

So, if the spiritual court refuses a plea of *mollitur manus* in defence of his servant, who was assaulted by a clerk who sued there for the violence. *R. Mo. 915.*

(G 13.) *For breach of faith.]* So, by the *st. Circ. agat. 13 Ed. 1.* the court Christian shall hold plea *de lacione fidei.*

And therefore a prohibition does not lie, if a libel be to oblige one to penance, who does not perform his oath or promise. *2 Rol. 283. l. 35. 40.*

So, for perjury in the spiritual court, in a cause within their consue-
fance. *Sal. 134. Bro. Jurisdiction, 20. Vide ante, (F 6.)*

But if the spiritual court proceeds against any for a false oath in a temporal court, or in a temporal cause, a prohibition lies; for *jurisdictionem non mutat fidei interpositio.* *2 Inst. 493. 2 Rol. 283. l. 27.*

As, against a juror, who gives a false verdict. *2 Rol. 304. l. 20.*

Or, an indictor, who gives a false oath on an indictment of felony. *R. 2 Rol. 304. l. 15.*

So, if a libel be against one who swears to pay a debt, make a feoffment, &c. and does it not. *F. N. B. 43. D. 2 Rol. 283. l. 30.*

If he swears that he will not sue an action, and afterwards sues it. *F. N. B. 42. I.*

So, if he takes a will out of the spiritual court, and gives a bond to re-deliver it, he shall not be sued for a breach of his faith, if he does not re-deliver it; for there is a remedy upon the bond. *2 Mod. Ca. 327, 8.*

So, if a man be cited as a witness in the spiritual court, a prohibition does not lie.

Or, to make answer upon oath to a libel for a matter within their consue-
fance; as, to discover whether he has paid a rate for repairing
the church. *R. 1 Vent. 339. R. 2 Lev. 247.*

Or, to take the oath of a churchwarden. *R. 2 Mod. 118.*

But

But if any be required to take an oath, which tends to the accusation of himself, a prohibition lies. 2 *Mod.* 118. 278. *Vide Serment* (B).

Or, to discover a thing which may subject him to censure or punishment.

Tho' the matter be notorious; as, that he was with his head covered in church at divine service. *Cont. per Wind. Sed qu. per Reporter.* 1 *Sid.* 232.

(G 14.) *For defamation.*] So, by the *st. Circ. agat.* 13 *Ed.* 1. the court Christian shall hold plea for defamation, when damages are not demanded.

Where the defamation charges a crime merely spiritual; as, if the libel be, that the defendant called him *heretic, schismatic.* 2 *Inst.* 492. *R.* 4 *Co.* 20. 7 *Co.* 44.

That the defendant charged him with adultery. *F. N. B.* 51. *I.*

Or, used words which accuse directly with incontinence. *R.* *Lut.* 1038. 1042.

As, if he said, *you are a whore*; for no prohibition lies for it since 8 *Car.* *R.* *Cro. Car.* 110. 2 *Rol.* 297. *l.* 45. *R.* 1 *Sid.* 404. 433. 1 *Mod.* 21. 1 *Vent.* 7. 61. 226. *R.* 2 *Lev.* 63. *Cont.* before 8 *Car.* *Jon.* 44. [*Vide 2 Term Rep.* 473.]

["Thou art a jilt and a strumpet;" prohibition denied *per Cur.* *Ferguson v. Cuthbert*, *H.* 1728, *Bunb.* 260. *Str.* 823.]

["*Moll Winter* is a whore, and a common whore, and plier in a bawdy-house;" refused after sentence. *Head v. Winter*, *H.* 1731, *Bunb.* 312.]

You are a Welch jade, with an averment that that imports a whore. *R.* 2 *Rol.* 297. *l.* 45.

He is a whore-master. *R.* *Sal.* 692. *Skin.* 390.

He is a cuckold; if the libel be by the husband and wife. *Lut.* 1038. 2 *Rol.* 296. *l.* 40. *Cont.* 1 *Sid.* 248. *Cont. per Holt*, *Sal.* 692. *R.* 2 *Lev.* 66.

He is a pander of A. *Per two J. Whitl. cont.* 2 *Rol.* 295. *l.* 55.

She will be a meddling with a ———. 2 *Rol.* 295. *l.* 45.

He is a son of a whore, without more; for that imports that he is a bastard, and his mother a whore. *R.* 3 *Lev.* 119.

A cuckoldy knave. *R.* *Cro. Car.* 339.

You was A's whore before he married you. *R.* 3 *Lev.* 137.

He keeps a whore in his house. *R.* 3 *Lev.* 350.

She has had a bastard. *Dub. Sho.* 337.

He is a wittoll; for that imports that he knows of the adultery of his wife. *Sal.* 692.

Tho' the words import a spiritual crime, which in some respect is punishable by the common law, if the spiritual jurisdiction is not taken away; as, if he says, *A. keeps a bawdy-house*; for tho' it be indictable, the spiritual court has a concurrent jurisdiction. 2 *Rol.* 296. *l.* 5. *Cont. Noy*, 117. *Vide infra.*

A. is a common bawd. *R.* 2 *Rol.* 295. *l.* 5. *Jon.* 246. *Pal.* 521.

Thou art a whore, and thy children bastards; for the statute saves the spiritual jurisdiction. 2 *Rol.* 296. *l.* 25.

A brandy-nosed whore, and drinks brandy. *R.* *Sal.* 693.

If he says of a widow, *she was never married, and what is her son?* R. Carth. 498.

So, if the defamation imports any charge whereby he may have prejudice in the spiritual court; as, if he says of a parson, *he will preach nothing but lies and malice in the pulpit.* R. 3 Lev. 17.

He lies with all the women in the parish. R. 3 Lev. 18.

So, if he says of a parson, speaking of his function, *he is a knave.* R. 2 Rol. 297. l. 40. Per Holt, 8 W. 3. (Com. 25.) Semb. Lut. 1054. 1 Sid. 393.

If he says of any man, *you are a son of a witch*; for it is an impediment to the taking of orders. R. 2 Rol. 295. l. 5. 1 Rol. 407.

He will not hear a minister ordained by a bishop. R. 2 Rol. 295. l. 42.

So, there shall be a libel for defamation, tho' provoked by scurrilous words. R. 3 Lev. 137. Semb. Lut. 1054.

But if a libel be for words which are actionable, a prohibition goes; as, if they charge with felony. F. N. B. 53. F. R. 2 Rol. 295. l. 10. Jon. 246. 22 Ed. 4. 20. Mo. 906. R. Jon. 320.

Or, with perjury. 2 Inst. 493.

So, if he says, *he was forsworn before a judge*; for they are actionable, if well alleged. R. 2 Rol. 297. l. 5.

So, if he says of an heir, *he is a bastard.* 2 Rol. 292. l. 14.

[Of a woman in London, *she is a whore.* Lut. 1040. 1042. Thyer v. Eastwick, H. 7 G. 3. 4 B. M. 2032.]

["You are a cuckoldy old rogue, and was cuckolded by a porter," spoke in London; prohibition granted. Vicars v. Worth, M. 8 Geo. Str. 471.]

["You are a cuckoldy dog, and bid the bitch your wife come out," spoke in London; prohibition granted. Hodgkins v. Corbet, H. 9 Geo. Str. 545.]

[For the word *whore*, tho' it appear on the face of the libel to be spoke in London, where action lies for it; prohibition denied after sentence. Argyle v. Hunt, T. 5 Geo. Str. 187. Fort. 347.]

[*Et per Cur.*—Matter *debors* the libel shall not be alleged after sentence as ground for prohibition, it must arise out of the libel itself, in defect of jurisdiction; and in that case it is never too late for sentence; and all are a nullity. *Ibid.*]

[For the word *strumpet*, in London, prohibition denied, because after sentence; on above case. Cook v. Wingfield. Fort. 347. Str. 555.]

[If motion and rule to shew cause be before sentence given below, for calling a woman whore, in London, but rule not served till after sentence; prohibition shall not go. Selby v. York, T. 10 & 11 Geo. 2. B. R. H. 392. Note, This is said to have been ruled on another point also; viz. that in the recital of the libel in the suggestion, the words are said to be spoken in the parish of Saint B. in London, or in parts near adjacent; if it had appeared by the proceedings, or by affidavit, (which was now too late,) to be in London. Prohibition ought to stand; for the spiritual judge had no jurisdiction. Andr. 7. N. B. This is contrary to Argyle v. Hunt, and Cock v. Wingfield, *supra*.]

Of any woman, *she is a bawd, and keeps a bawdy-house*; for it is indictable. R. Jon. 44. Vide *supra*.

[No prohibition for "You are a bawd." Lockey v. Dangerfield, M. 12 Geo. 2. Str. 1100. Andr. 286.]

So, if he speaks in *London*, of a woman there, words tantamount to *whore*. R. 2 Mod. Ca. 114.

So, if part of the words be actionable, a prohibition goes for the whole, tho' the others charge with a spiritual crime; as, if he says, *you are a whore and thief*. 2 Rol. 297. l. 45. Per Twisd. 1 Sid. 404. R. 3 Mod. 74.

So, if the words relate to a temporal thing, of which the spiritual court has no conufance; as, *you are a sower of sedition among neighbours*. R. 2 Rol. 295. l. 35.

He would have buggered me; for that offence is felony. R. 2 Rol. 296. l. 50.

He kept my wife in his house against her will, to make her his harlot; for he might have false imprisonment. Godb. 63.

So, if words are spoken in evidence at a trial, or prosecution for an offence of which they are spoken. R. 1 Rol. 61.

So, if the spiritual court refuses a good justification of the words by the common law; as, to a libel for saying, *you had a bastard*, if the defendant pleads an order by two justices, which adjudged him the father of a bastard, and the spiritual court diallows the justification. R. 2 Cro. 535. 625. 2 Rol. 82.

So, if the words proceed from passion merely; as, if a parson calls another *drunkard*, upon which he says, *you lie*, and the parson libels for it. R. 2 Rol. 295. l. 22. 297. l. 25. Semb. Lut. 1054. Godb. 446.

[If one parson says to another, "you are an old rogue, and a rascal, and a contemptible fellow, despised and hated by every body;" prohibition lies. *Musgrave v. Bovey*, H. 6 Geo. 2. Str. 946.]

If a man says of a parson, *he is a blockhead, and deserves his gown to be pulled over his ears*. R. Sal. 692.

Or, *he is a fool, ass, goose, &c.* R. 2 Lev. 41. Godb. 447.

If a man calls another *drunkard*. R. 2 Rol. 296. l. 30. Godb. 447. Mar. pl. 11. 103. R. Jon. 441. 305.

Knave. 2 Inst. 493. 2 Rol. 296. l. 45. Jon. 246. D. 1 Sid. 49. R. Sal. 548. 1 Rol. 217. 1 Vent. 2.

Tho' he be a parson, if he does not speak in reference to his function. R. 2 Rol. 295. l. 30. Cont. *ibid.* 40. R. 1 Vent. 2. 1 Sid. 393. R. H. 8 W. 3. (Com. 25.)

Base poultry rogue. Godb. 447.

So, if a man calls another, *son of a whore, and thy mother is a bitch*. R. 2 Rol. 296. l. 20. Vide *supra*.

If he says, *you are a quean*. R. 2 Rol. 296. l. 15. 1 Rol. 217.

If he says of a parson, *he is a churl, or blacksmith's son*. 2 Inst. 493. 2 Rol. 297. l. 25.

Of a proctor, *he is a scabby knave, and pickerill bumb-bailiff*. R. 2 Rol. 297. l. 15.

If he says, *he is the devil, Belzebub, &c.* Sal. 692.

Yet, after sentence, a prohibition shall not be granted, because they were words of passion, where the spiritual court has conufance. Semb. 3 Lev. 350. Lut. 1054.

Nor, after a plea which submits to the jurisdiction. 1 Vent. 10. Lut. 1042.

[Where prohibition is prayed for a matter not appearing on the face of the proceedings to be out of the jurisdiction, the suggestion must

be verified by affidavit; therefore, tho' there is a custom, and that custom verified by affidavit, that whores, and calling a woman a whore, is punishable at *Bristol* by common law; yet, if there is not an affidavit that the words were spoken in *Bristol*, prohibition shall not go. *Hinds v. Thompson*, M. 12 G. 2. Andr. 299. *Driver v. Driver*, H. 12 G. 2. Andr. 304. N. B. In this case it was said, the same thing was held in *Argyle v. Hunt*, ante.]

[Yet, a rule to shew cause was granted, why prohibition should not go for calling a woman *strumpet*, in *Bristol*, tho' there was no affidavit of the custom. *Power v. Shaw*, P. 17 Geo. 2. Wilf. 62.]

(C 15.) *For matters matrimonial.*] So, the spiritual court, by consent of parliament, and the custom of the realm, has consuance of matters matrimonial and testamentary, tho' they do not belong to them originally. 2 *Inst.* 488.

As, of marriage, divorce, bastardy. 5 Co. 9. a. *De Jure Eccl.*

By the *st.* 18 *Ed.* 3. *st.* 3. *ch.* 2. if on demand of clergy, it be alleged that the prisoner hath married two wives, or a widow, the justices shall not have cognizance, or power to try the bigamy, but it shall be sent to the spiritual court. By the *st.* 25 H. 8. 22. a person married within the Levitical degrees shall be separate by the sentence of the archbishop or bishop within their jurisdictions, and no other authority.

And therefore, if a libel be for a marriage without licence, or banns published, a prohibition does not go. *R. Jon.* 259. *Vide infra.*

Or, by an insufficient licence, or not pursuing it. *R. Jon.* 259.

[The spiritual court has jurisdiction to proceed against persons for clandestine marriage, under the former canon law, received and allowed, (but not under the canons of 1603,) *per Hardwicke C. J. & tot. Cur.* *Middleton v. Croft*, M. 10 G. 2. *Str.* 1056. *B. R. H.* 326.]

[Nor, has the *stat.* 7 & 8 W. 3. c. 35. which inflicts a penalty, taken away that antient jurisdiction. *Ibid.*]

[If, therefore, a man and his wife are sued for being married before eight in the morning, without licence or banns, prohibition shall go as to the time, which is only against canons of 1603, and a consultation as to the rest. *Ibid.*]

So, if it be for punishment of an incestuous marriage after the death of the wife; if they do not proceed to dissolve the marriage, and bastardize the issue. *Sal.* 548.

So, if it be to dissolve an incestuous marriage; whereby the issue will be bastardized. *R.* 2 *Jon.* 213.

[The spiritual court may hold suit for marrying wife's sister's daughter. *Donny v. Ashwell*, P. 3 G. *Str.* 53.]

To repeal an administration to a second wife, because the first wife is living; whereby the issue by the second will be a bastard. *Sti.* 10.

So, if a libel be in the spiritual court for a marriage-portion, a prohibition does not go; as, for such a sum promised to be given with his daughter in marriage. *F. N. B.* 44. A.

So, if a libel be in the spiritual court, that he married without licence; though the marriage was by an incumbent of a donative within his precinct. *R. per three J.* 1 *Mod.* 22.

But a prohibition lies, if the spiritual court questions the marriage after the death of the parties. 2 *Inst.* 614. *R. Sal.* 548.

Or,

Or, questions the power of the archbishop to grant a licence by the
fl. 25 *H.* 8. 21. without publication of banns. *R.* *Jon.* 259.

So, if a libel be *pro jactitatione maritaggi*, after the husband is convicted of felony in taking her for his second wife. *R.* 3 *Mod.* 164.

So, if a libel be to bastardize issue directly; for legitimacy shall be determined by the common law. *Sti.* 10.

So, if a libel be, by practice to dissolve a marriage for incest, and bastardize the issue, upon confession of the party only. *Semb.* 2 *Jon.* 213. 2 *Mod.* 314.

(G 16.) *For matters testamentary; as, the probate of a will.*] So, for a matter testamentary, the spiritual court, (tho' it had no jurisdiction originally,) yet shall have it at this day; and therefore the probate of a will for personal things shall be properly in the spiritual court, and no prohibition goes. *Sal.* 552. *Vide Administration*, (B 6.)

So, if a will be for things personal, and also for land, being entire, it shall be proved in the spiritual court; and no prohibition goes as to the land; for the probate there, as to that, does not prejudice, but shall be null. *R. cont.* 2 *Rol.* 315. *l.* 10. for it shall go as to the land. So it was, *R.* 2 *Cro.* 346. *R. Cro. Car.* 165. 115. 2 *Rol.* 315. *l.* 20. *R.* 6 *Co.* 23. *b.* 1 *Rol.* 21. 358. 2 *Rol.* 431. *R. Pal.* 120.— But afterwards it was *R.* that it should not go for any part. *Per two J. Cro. cont.* 2 *Rol.* 315. *l.* 50. *Cro. Car.* 391. 396. *Jon.* 355. *R. per tot. Cur.* 1650. 2 *Rol.* 315. *l.* 40. *R. Sal.* 552, 3. *Per Hale*, 1 *Mod.* 90. *Hard.* 313.

So, the probate of a will for things personal, and land, shall not be prohibited in the spiritual court, tho' the question there be, whether the testator was *compos?* whether the will was revoked? &c. which avoid the whole will; for the determination there will not be evidence in a trial upon the will for the land at the common law. *Cro. Car.* 396. 2 *Rol.* 315. *l.* 5. 15. 30. 40. *Sal.* 552. *Hard.* 131.

So, the probate of a will of a *feme-covert*, of things in action, or which she had as executrix, (of which she may make a will,) shall not be prohibited in respect of her coverture. *Per North*, 1 *Mod.* 211. *Per Holt*, *Sal.* 313.

So, if the ecclesiastical court allows a will by an infant of sixteen years; for the consueance belongs to them. *R.* 2 *Jon.* 210.

(G 17.) *Bequest of a legacy.*] So, a suit for a legacy shall be properly in the spiritual court; for it is not a debt, but due only by the will; and no prohibition goes. *F. N. B.* 50. *O.* 51. *H.* 53. *C.* 1 *Vent.* 233.

Tho' the legacy be a chattel real; as, a ward, term, &c. *F. N. B.* 43. *F.*

So, if a testator devises, that his executor pay a debt to his creditor; it shall be a legacy; for which the creditor shall sue in the spiritual court. *F. N. B.* 44. *B.*

Or, 10*l.* in satisfaction of a debt of 5*l.*; for it is a new sum of which no part was due. *R.* 2 *Rol.* 284. *l.* 25.

So, if he devise, that the goods of the parish, which he took by wrong, be re-delivered. *F. N. B.* 52. *E.*

If he devise a cow, &c. for repair of the church. *F. N. B.* 54. *E.*

So, if he devises so much *per ann.* in the nature of a rent, to be paid out of a chattel; as, out of his stock. *R. 2 Rol. 284. l. 30.*

Or, out of the profits of a term for years; for that is a chattel. *R. 2 Rol. 285. l. 10.*

Or, out of a debt due by *A.* *2 Rol. 433.*

Or, out of the profits of lands (part leasehold and part freehold) for seven years, and afterwards the years elapse, and the devisee of the lands dies before payment; for account does not lie against his executor. *R. per four J. Williams dub. 2 Cro. 279.*

[An executor may be sued for a legacy in the court where he proves the will, tho' he does not live in that diocese, and prohibition does not lie. *Edgeworth v. Smallridge, M. 3 G. 2. Str. 847.*]

But a prohibition goes, if a suit be there upon a devise of lands or tenements. *F. N. B. 43. F. R. Pal. 120.*

Or, for a legacy devised to be paid out of lands of which he is seised in fee. *R. 2 Rol. 284. l. 35.*

Tho' it is to be paid out of land, if there be not personal assets. *R. 2 Rol. 284. l. 40. Poph. 58.*

Or, to be paid upon a sale of lands. *R. 2 Rol. 284. l. 50. Hob. 265.*

Or, if a devise be, that land be sold, and the money employed in the payment of legacies. *R. 2 Rol. 285. l. 15. Hob. 265. Dy. 151. But cont. per three J. where it was for payment of legacies generally. Dy. 264. b.*

So, if a suit be for that which is a legacy in a court of equity only. *2 Rol. 285. l. 32. Hob. 265.*

So, if a suit be for the revocation of a guardianship appointed by will, pursuant to the *st. 12 Car. 2. 24.*; for the temporal court is to determine whether the appointment be pursuant to the statute. *R. 1 Vent. 207.*

So, if a suit be to have money raised by sale of lands put into the inventory; for by the *st. 21 H. 8. 5.* it is not accounted goods and chattels of the testator. *R. 2 Rol. 285. l. 25. 30.*

So, if a bond be given for a legacy; for thereby it becomes a debt. *R. Yel. 39. 2 Mod. Ca. 327, 8. Vide ante, (F 5.)*

So, a prohibition goes, if the spiritual court proceeds to grant probate of a will, which is not so by the common law; as, of a will of a *feme-covert* made by covenant or agreement of the husband; for it is not properly a will. *Per North, 1 Mod. 211. Per Holt, Sal. 313.*

If a probate be by a peculiar, where it ought to be by a bishop; or, *è contra.* *Per North, 1 Mod. 211.*

(G 18.) *Granting or repealing administration.*] So, if a suit be in the spiritual court for the granting or repealing administration, in cases where the temporal law does not disallow it, a prohibition does not go; for it is a matter of spiritual consufance.

So, if administration to *A.* be repealed, and granted to *B.* who libels against *A.* to account to him; a prohibition does not go. *R. 2 Rol. 283. l. 10.*

But if a suit be for a temerarious administration, and hindring him from making an inventory of the goods; a prohibition goes; for by these means the property of the goods will be there determined. *R. 2 Rol. 287. l. 45.*

Or,

Or, the husband of an administratrix be sued, after the death of his wife, for wasting the goods. *R. 2 Rol. 302. l. 32. 40.*

So, if a suit be to repeal an administration without cause, after a grant of it, a prohibition goes; for their power is executed. *D. Cro. Car. 63. 202. R. 1 Sid. 179. 372. 1 Lev. 186. 305. Ray. 93. Vide Administrator, (B 8.)*

Yet, if surprise or collusion in obtaining the grant be suggested, a prohibition does not go. *R. F. g. 304.*

So, a prohibition shall go, if a suit be for administration from the archbishop, &c. where there are not *bona notabilia*. *Per North, 1 Mod. 211.*

(G 19.) *Exhibiting an inventory.*] So, the ecclesiastical court may require the exhibiting an inventory of the goods of a testator or intestate, with their true value, within a year.

But if the ecclesiastical court charges the executor or administrator above the value of the goods, because an inventory was not duly exhibited, a prohibition goes. *Poph. 58.*

(G 20.) *Granting of guardianship.*] So, the spiritual court may appoint a guardian or curator for the goods of an infant, who has no land. *R. 2 Lev. 217.*

Which curator may sue there for detaining the infant. *Dub. 2 Lev. 219.*

But if an infant has a guardian by tenure or will, or otherwise by the common law, the spiritual court cannot appoint a curator for the infant. *2 Lev. 217.*

So, if a libel be, that a curator appointed by the spiritual court, generally, ought to have the custody, a prohibition goes; tho' in the answer to the suggestion it be insisted only, that the spiritual court shall appoint, where none is appointed by the common law. *R. 2 Lev. 217.*

And it is sufficient for a prohibition, if it be suggested, that the father has appointed a guardian, without saying how. *Per Scrogs, 2 Lev. 219.*

(G 21.) *Accounting by an executor or administrator.*] So, the spiritual court may require an executor, or administrator, to account before them. *1 Rol. 123. 358.*

So, the spiritual court may oblige an executor to make distribution to one, of his reasonable part of the goods of the testator, according to the custom of *York*, tho' remedy may be by the common law. *R. Lev. 128.*

(G 22.) The Spiritual Court, having Jurisdiction, shall proceed, tho' it be contrary to the Rules of the Common Law.

Where the spiritual court has consueance and jurisdiction of the matter, a prohibition shall not be granted, tho' the proceeding there differs from the rules of the common law; as, if a woman after a divorce *causa adulterii*, by which the marriage is not dissolved *à vinculo*, sues there, for defamation within their consueance, without her husband. *R. 2 Rol. 298. l. 30.*

Or, if a *feme-covert* be sued there for an offence within their conu-
sance, without her husband. 2 *Rol.* 298. l. 40.

So, if a woman sues for a separation *propter sevitiam*, and upon
sentence for the husband, the wife appeals; the husband, at his
charge, shall transmit the record. *Semb. Cro. Car.* 16.

So, if a release of the husband, of a suit or costs, pleaded to a suit
by a wife divorced *causâ adulterii*, be disallowed. R. 2 *Rol.* 301. l. 5.

So, if a suit be for double damages, in not setting out of tythes,
against an executor; tho' an action does not lie by the common law
against an executor, upon the *stat.* 2 *Ed.* 6. 13. for the not setting out
of tythes by the testator. R. *Ray.* 95.

If a suit be there by an administrator of an executor against the ex-
ecutor of another, for a legacy by the first testator. R. *Ray.* 123.

If the executor of an appellant proceeds upon an appeal by his testa-
tor; for an appeal does not abate, R. 2 *Lev.* 6.

If a charge of slander be, that he spoke such words, *vel his similia*,
R. 2 *Cro.* 159.

If they cite a corporation, by the members in their natural capacity,
R. *Skin.* 27.

So, where a thing is merely of spiritual jurisdiction, a prohibition
shall not be granted, tho' proof be disallowed, which would be
sufficient for the fact at the common law; as, if a probate of a will
for personal estate be disallowed because the proof of it is made only
by a single witness. *Vide ante*, (F 13.)—*post.* (G 23.)

So, if the probate of a nuncupative will were disallowed, being
proved only by one witness, *Carth.* 143.

(G 23.) So, where it has Conuſance of the Principal, it shall deter-
mine that which is incident.

So, if a suit be in the spiritual court for a thing within their conu-
sance, and a temporal matter becomes incident, it shall be determined
there, and no prohibition goes. 12 *Cō.* 65. *Sti.* 10. *Carth.* 143.
[Unless they proceed to try contrary to the course of the common law,
Cowp. 424.]

As, if in a suit for tythes, payment be pleaded, and denied; it shall
be tried there. R. 2 *Rol.* 305. l. 55. 1 *Rol.* 12.

Tho' the suit be founded upon a *modus decimandi*. 2 *Rol.* 305;
l. 50. *Hob.* 247.

So, if simony be pleaded, for it may be tried there. R. *Cro. El.*
642.

So, in a suit for a legacy, if a release be pleaded, it shall be tried
there. 2 *Rol.* 307. l. 10. 1 *Rol.* 12.

Or, a judgment, and no assents *ultra*, and it be replied, that the
recovery was by *covin*. R. *Mo.* 917.

If to a suit for tythes, an award be pleaded, and denied; it shall
be tried there. R. 1 *Rol.* 12.

So, if a suit be there for repairs of a church, and that by custom
the constable ought to collect; a prohibition does not go, if nothing
be disallowed which is allowed by the common law, R. *Hard.* 510.

If in a suit for tythes arising upon his land, the defendant says,
that it is the land of another. 1 *Sid.* 89.

That the land lies in another vill. R. 1 *Sid.* 89.

If in a suit for tythes, the defendant says, that he agreed with the parson for his life, paying so much *per ann.* and the plaintiff insists, that for default of payment, the agreement is determined; for the contract is not disputed, but the payment only. *R. 2 Rol. 42.*

If in a suit for tythes, the defendant says, that he severed them, and permitted the gate to be open for the parson to take them; and the issue be, that the gate was not open. *Cro. El. 843, 4.*

If a suit be for a way by prescription, for carrying away of tythes, and the defendant says, that the way is in another place. *R. Jon. 230.*

If a suit be for tythes, and the defendant claims the rectory by feoffment, which is denied; it shall be tried there. *2 Cro. 270.*

So, no prohibition goes, tho' the right be settled by act of parliament, if the proceeding there be conformable to the common law; as, in a suit by a mortgagor for tythes, where the estate, by a private act of parliament, was transferred from the mortgagee to Sir *W. Juxon*, who claimed there *pro interesse suo*; for he is not entitled by the common law to the tythes, till he has recovered by ejectment. *R. 2 Lev. 64.*

But a prohibition shall go, if the spiritual court proceeds after the thing is discharged by the common law; as, if a suit be for punishment of an offence within their consuance, after a pardon. *Vide ante, (F 12.—G 8.)*

As, for defamation, after the offence charged by the words is pardoned. *R. Mo. 855.*

So, if the suit in the spiritual court charges those who are discharged by the common law.

If it charges a defendant with costs in a suit *ex officio*, and not between party and party. *Dub. Hard. 503.*

Or, charges him only, who is not to be charged alone by the common law; as, if a parson sues a lessee of parcel of a rectory solely, for a portion of tythes payable out of the whole rectory. *R. 1 Leo. 11.*

So, if a suit in the spiritual court be determined contrary to the right by the common law; as, if a suit be by the executor of *A.* for a legacy given jointly to *A.* and *B.*, because the spiritual court does not allow survivorship. *R. 2 Lev. 209.*

If an award, &c. pleaded be disallowed, when it is good by law. *R. 1 Rol. 12.*

So, if the spiritual court disallows proof sufficient by the common law; as, proof of payment by one witness. *R. Hutt. 22. R. Mo. 909. Per Hale, 1 Vent. 291, 2 Rol. 439. Cro. El. 666. Vide ante, (F 13.—G 22.)*

Or, proof of the revocation of a will, by a single witness. *Carth. 143.*

So, if the spiritual court disallows a plea of *misnomer*, where the defendant is called baronet, when he is only a knight. *R. Ray. 219.*

But there shall not be a prohibition, upon a suggestion that the defendant had only a single witness, if such proof be not offered in the spiritual court, and refused for the insufficiency of the proof. *Carth. 144. R. 2 Cro. 270.*

Or, upon a suggestion, that a witness is rejected as not credible, when he would be a good witness by the common law. *Carth. 143, 4.*

Or,

Or, upon a suggestion, that the proceeding there was *ex mero officio*, without a presentment, or proper accusation; for this lies within their conuance; and if they do it, the remedy shall be by appeal. *R. 2 Vent. 44.*

(H 1.) Proceedings to obtain a Prohibition.

BY the *st. 2* (or *2 & 3*) *Ed. 6. 13.* if any sue a prohibition, &c. he shall deliver to the justices of the court a true copy of the libel, &c. under his hand, and under it the suggestion.

And before a prohibition granted there ought to be notice to the other party.

And therefore, it shall not be granted upon motion the last day of term; for it is sufficient to have a rule for cause the first day of the next term. *Latch, 7.*

So, upon notice, the party upon a surmise shall discharge the suggestion before it is entered upon record. *1 Leo. 11.*

Or, the court may discharge the rule for a prohibition *nisi*, &c. without putting the parties to join issue, or demur. *1 Sid. 163.*

[If the ecclesiastical court appears clearly to have jurisdiction, and have pronounced sentence, the court will not even grant rule to shew cause. *Symes v. Symes, T. 32 & 33 G. 2. 2 B. M. 813.*]

[There must be an affidavit, that the copy of the libel is a true one. *Barnes, 427.*]

[If a civilian cannot be got to argue for it, none shall be heard against it. *Barnes, 428.*]

So, the suggestion ought to be positive and direct; for if a suggestion, for a prohibition upon a libel for defamatory words, says, that the words, if they were spoken, were all at one time, it is bad; for the words ought to be confessed. *1 Vent. 10. Lut. 1043.*

So, if a prohibition be to a temporal court, there ought to be a suggestion. *R. 1 Lev. 253.*

If a prohibition be granted, it ought to be served before a subsequent proceeding to sentence, or appeal. *Vide post. (K 1.)*

And if it be served, and the judge proceeds afterwards, an attachment goes; and he shall be examined upon interrogatories, and fined for his contempt. *2 Jon. 47.*

But if a party be excommunicated for want of an answer after a prohibition granted, yet the prohibition may be served afterwards. *2 Cro. 429.*

(H 2.) When the Suggestion ought to be proved.

By the *st. 2* (or *2 & 3*) *Ed. 6. 13.* if any sue for a prohibition, he shall deliver to the justices a copy of the libel, and under it the suggestion; and if such suggestion be not proved by two witnesses, in six months following, the plaintiff in the ecclesiastical court, on request, shall have a consultation, double costs, and damages, to be assessed by the court, &c.

The proof ought to be within six calendar months after the *teste* of the prohibition. *Sal. 554.*

[If the declaration is ordered to be amended, the time for proving suggestion is computed from amendment. *Barnes, 428.*]

And by credible witnesses. *R. 2 Bul. 154.*

But

But it is sufficient, if proof be made within six months, tho' it be not recorded till afterwards. *R. Noy, 30.*

And it may be made in the vacation. *Noy, 30.*

Proof of the suggestion is requisite in all cases, where the matter suggested is merely matter in fact; as, if a *modus* be suggested. *Godb. 245, 6. Carth. 463.*

Or, a payment, &c. by a lord of a manor, for himself and his tenants, for the benefit of the parson. *1 Rol. 3.*

And all the suggestion, which goes to the advantage of the parson, ought to be proved. *R. 1 Rol. 2, 3.*

So, if the suggestion be, that the land was barren heath, improved within seven years. *R. Cro. Car. 208. Adm. Dy. 170. b. D. cont. Vel. 102. 119. R. Jon. 231. 2 Sho. 92.*

Proof of a suggestion is necessary, where a prohibition is to a suit for tythes predial or personal, given to the spiritual court by the *sf. 2 Ed. 6.* or to a suit for mixt tythes, or oblations, given by the *sf. 27 H. 8. 20.* and *32 H. 8. 7. 2 Inst. 662.*

Or, of a suggestion of a discharge by the *sf. 31 H. 8. Adm. 1 Rol. 55, 6. 2 Rol. 125.*

Proof that the plaintiff himself hath paid such a *modus* is sufficient. *R. Noy, 28.*

Or, that it is the common fame, that there is such a *modus*; or, that he has known it paid. *Noy, 28.*

So, proof by one witness for part, and by another witness for the other part of the suggestion. *D. 1 Vent. 107.*

So, proof of so much of the suggestion, as shews a good *modus* to oust the parson, is sufficient; tho' it varies from the *modus* suggested:

As, if the suggestion be of a *modus* of *4s.* and the proof of a *modus* of *4s. 6d.*; or, two closes, and the proof of only one, &c. *R. Mo. 911.*

But proof is not necessary, where the suggestion is, that tythes are not due by law; as, where the suit is for tythes of tiles, turf, stone, &c. *2 Inst. 662.*

So, if the suggestion be, that the parson leased, or agreed for his tythes. *R. Vel. 102. 119.*

Or, that they are discharged by award. *R. 1 Rol. 55.*

So, proof is not necessary, where the suggestion is in the negative; for a negative cannot be proved: as, that a parson is not inducted. *2 Inst. 662.*

That the land does not lie in the parish. *Ibid.*

That the parsonage is not impropriate. *Ibid.*

So, if a prohibition be prayed upon a discharge by the king's patent, the patent ought to be produced, being upon record. *D. 1 Vent. 120.*

(I) Declaration upon a Prohibition.

[LEAVE to declare in prohibition will be granted only when the court inclines to prohibit, not when it inclines to the contrary. *1 Bl. Rep. 81. Doug. 620.*]

[The party applying for a prohibition, has no right to insist on declaring, when the court is satisfied that his application is groundless; but the *defendant* in prohibition may, when the opinion of the court is against him. *1 Bur. 198.*]

The

The declaration in prohibition is founded upon the attachment for a contempt supposed in him who neglects the writ of prohibition directed to him. 12 Co. 59.

In all cases, where a writ of prohibition is sued, directed to the party, or to the judges, or to both, as it may be, if they proceed afterwards, there shall be an attachment against them. *F. N. B.* 40. *D. usq. K.*

And therefore a declaration by the party shall be *qui tam*, &c.; for it supposes a contempt to the king. 12 Co. 61.

So, a declaration, which alleges a prescription for a discharge of tythes, ought to shew that the matters, for which the libel is in the spiritual court, are within the prescription; as, if the prescription be, to be discharged for tythes of cattle reared for the plough, it ought to allege that the libel was for tythes of such cattle. *R. 1 Rol.* 62

If it prescribes, that all having milch-kine in the parish, and paying nine cheeses, should be discharged of tythes for herbage, &c.; it ought to allege, that the party has milch-kine in the parish. *Ibid.*

So, the declaration ought to shew a place where the defendant proceeded after the prohibition served; otherwise the plaintiff shall not have judgment, tho' the writ of inquiry finds damages. *R. 1 Vent.* 348. 350. *Ray.* 387. 2 *Jon.* 128. 2 *Sbo.* 145.

But two persons cannot join in a declaration upon a prohibition, where the cause of complaint is several. *R. Cro. Car.* 162.

So, if the writ of prohibition be against judge and party, who live in several counties, there must be several attachments, and, by consequence, several declarations, tho' there was but one writ. *F. N. B.* 40. *I.*

So, if there were several writs, one against the judge, the other against the party, tho' they were all in the same county. *Ibid.*

So, if a libel be against several parishioners, who all insist upon the same *modus*; they cannot join, but must have several prohibitions. *R. Ray.* 425. *R. Tel.* 128, 9.

So, if a man alleges a *modus* for discharge of tythes, he need not allege that he has paid the *modus*. *R. 1 Rol.* 62, 3.

If he alleges payment of the tenth cock for all tythes of barley and rakings involuntarily scattered, he need not say, that they are involuntarily scattered; for it shall come on the other part. *R. Cro. El.* 702.

So, if there appears cause for a prohibition, there shall not be a consultation, tho' the declaration be defective for want of form; as, because there is not a *profert* of a deed, or letters patent. *Per Coke*, 1 *Rol.* 332.

Vide more concerning the proceeding in prohibition in *Pleader* (3 H).

(K) Consultation.

(K 1.) When it lies.

BY the *st. de consult.* 24 *Ed.* 1. if, on sight of the libel, the justices see the matter belongs to the spiritual judges, they shall write to them to proceed, *regia prohibitionem non obstante*.

And therefore, if upon motion for a prohibition, when a copy of the libel is produced, (as it ought to be,) it appears that the matter is of spiritual conusance, no prohibition shall go.

Or,

Or, if a prohibition was granted without notice to the other party, and upon motion it appears that there was no cause for it; the court will grant a consultation, without putting him to declare upon the prohibition. *Cro. Cor.* 97.

[Consultation lies, tho' the refusal of the plea in the spiritual court was not traversed.]

[Tho' the issues are immaterial.]

[Tho' no verdict is found as to the contempt.]

[And if judgment is generally for a consultation, whereas the plea was only for two parts, and the libel for two third parts, it is well.]

[If the judgment is, *nil. cap. per billam*, and not *quod le defendant eat sine die*, it is right, if there is also judgment that a writ of consultation be granted; for that is the true judgment. *Stratford v. Neale*, *M.* 8 *G. Fort.* 350.]

So, after a prohibition granted, if, upon trial, the matter be found for the defendant, generally, a consultation shall go.

[If prohibition is granted, on suggestion of a custom, and on issue joined the custom is found, but the court, on motion in arrest of judgment, find the custom ill, a consultation shall go. *Dent v. Coates*, *M.* 14 *G. 2. Str.* 1145.]

So, if the matter found for the defendant varies in words, but not in substance, from the suggestion; as, if the suggestion be, that *two thirds of the tythes* belong to the plaintiff, and the verdict is, *two entire parts of all tythes*.

So, if there be a material variance between the suggestion for a prohibition, and the libel in the spiritual court, there ought to be a consultation; for the prohibition ought to be founded upon the libel; as, if the libel be for tythes of corn, and a *modus* be suggested for tythes of hay, upon demurrer to the declaration in prohibition, a consultation shall go. *Yel.* 79.

So, if there be a variance in the quantity; as, if the libel be for 200 faggots of wood, and the suggestion be as to 20 faggots only. *Yel.* 79.

So, if after a prohibition granted, it appears that the spiritual court has consance for part, a consultation shall go *quoad*, &c. 12 *Co.* 44.

So, if after a prohibition granted, it be not served till sentence and appeal, it cannot be afterwards used. 2 *Cro.* 429. *Vide ante*, (H 1.)

(K 2.) When not.

But a consultation shall not be granted, except in term. *R.* 12 *Co.* 41.

Nor, by a judge, but only in court. *Ibid.*

So, after a declaration upon a prohibition, it shall not be granted upon motion, before plea or demurrer. *Cro. Car.* 238.

So, a consultation shall not go, where a verdict is found for the defendant, if upon the whole matter it appears that the spiritual court has no consance; as, if a prohibition be upon a suggestion, that all lands in *A.* are discharged by a *modus*, and there is a verdict for the defendant, because it is found that all, except ten acres, are within the *modus*; yet a consultation does not go for such mistake in the issue, if the libel was not for tythes of the ten acres. *R.* 2 *Rol.* 320. *l.* 5. 15. *Hob.* 192.

So, if the suggestion was of unity, *ratione cujus* he shall be discharged, and

and a verdict finds, that he shall not be discharged *ratione inde*, though it be against the plaintiff, yet being impertinent, for the fact to be tried was, whether there was an unity, &c.; a consultation does not go. *R. 2 Rol. 320. l. 35. 11 Co. 15.*

So, tho' there be an immaterial variance between the suggestion and the libel, a consultation does not go; as, if the suggestion be for a total discharge upon the *ft. 31 H. 8.* and recites the libel to be for twenty faggots, where it was for 200; for it is not material for what quantity the libel was, when the plaintiff claims a discharge for the whole. *R. Tel. 79.*

So, if the suggestion varies in quantity, from the libel, if it be conformable to the copy of the libel delivered by the spiritual court, this variance shall not be a ground for a consultation. *2 Rol. 329. l. 45.*

[So, if plaintiff in prohibition declares, that there is a *custom* for the occupiers of his tenement to pay 5s. in lieu of tythe of corn and hay, which *modus* the parson has always accepted, and verdict for plaintiff, there shall be no consultation; for the *modus* is found, tho' it is described as a custom, when strictly it should have been a prescription. *Sharp v. Lowther, T. 9 G. 2. B. R. H. 292.*]

(K 3.) No Prohibition after a Consultation.

By the *ft. 50 Ed. 3. 4.* no prohibition shall go after a consultation, unless the libel be engrossed, enlarged, or otherwise changed,

And therefore, regularly, where a consultation was awarded upon the merits, the party shall not have another prohibition upon the same suggestion.

Tho' he appeals, and then prays another prohibition. *R. Poph. 159. R. Latch, 6. R. Mo. 917. 1 Rol. 378.*

Tho' the consultation be granted by another court. *R. Cro. El. 277.*

Tho' he varies the *modus*, upon which the former prohibition was had. *R. 1 Rol. 378.*

(K 4.) *Except where the consultation was upon matter of form; and other instances.*] But if a consultation was awarded for want of form in the suggestion, or proceeding thereon, another prohibition may be allowed. *Cro. Car. 208.*

As, if the consultation was awarded for want of proof of the suggestion within six months. *R. Tel. 102. R. Cro. Car. 208. R. Jon. 231. R. Carth. 463.* In another suit for the same matter, but not in the same suit. *Mo. 917.*

If after a consultation for want of proving his suggestion, the party appeals, there may be another prohibition to the court, to which the appeal was, upon the same suggestion. *2 Rol. 500.*

So, if after a consultation the libel is enlarged, or changed; as, if the former libel was, that tythes had been paid time whereof, &c. and afterwards it is added, that tho' the prior, &c. were discharged, yet for twenty, thirty, or forty years, and time whereof, &c. tythes were paid. *2 Rol. 207.*

So, if a consultation goes for a collateral matter; as, if the plaintiff was nonsuited.

So, if the suggestion was for a *modus* of tythe of lambs in a particular

ticular farm, and thereon a consultation goes; another prohibition shall go upon a suggestion of the same *modus* in the whole parish. *Semb.* [*Cont.*—The case cited is here reversed. The first suggestion was as to the parish, and the second, to the particular farm.] 2 *Vent.* 47.

So, if consultation goes, and there be afterwards a new libel for the same species of tythes in another year; a prohibition shall go upon the same suggestion as was tried before. *Adm. Vel.* 102.

So, if a consultation goes, and the party against whom appeals; the appellee may have a prohibition, tho' the appellant cannot have it. *R. Popb.* 159.

So, if after a consultation, the plaintiff pleads the same matter (which was suggested, and found against him at common law) in the spiritual court, which is accepted, and proceeds there for trial, the former defendant may have a new prohibition; for they cannot try in the spiritual court a matter determined by a trial at common law, which was proper to be there tried; as, if a discharge within the *β.* 31 *H. 8.* was suggested. *R. 2 Rol.* 319. *l.* 45. *Hob.* 286.

Prohibition to the Admiralty.

Vide Admiralty, (F 2, &c.)

Prohibition of Waste.

Vide Waste, (A 1.)

PROMISE.

Vide Action upon the Case upon Assumpsit.—Temps, (G 18.)

PROMISSORY NOTE.

Vide Action upon the Case upon Assumpsit, (A 2.)—Merchant, (F 15, &c.)

PROMOTER.

Vide Information.

PROMULGATION OF A LAW.

Vide Parliament, (G 23.)

PROPERTY.

(A) The Original of Property.

JUS in res inferioris naturæ Deus humano generi indivisim contulit; hinc factum, quod quisque in suos usus arripuit, sui proprium devenit. Grotius de Jure Belli & Pacis, l. 2. c. 2. f. 2.

(B) How Property is vested, or divested.

THE property of goods vests in another by succession, grant, sale, caption, &c. *Vide Biens* (D 1, &c.—E).

So, if a man pledges goods to another, he has a special property. *Vide Mortgage.*

So, if a man forfeits his goods, the property is thereby altered; as, after a condemnation and proclamation in the *Exchequer* of goods as forfeited, the former owner cannot maintain trespass, or trover for them. *R. Ray.* 336.

In what Things a Man has a Property.

Vide Biens (F—G 1, 2.—H).

Vide Action upon the Case, per Totum.—*Charters* (A).—*Justices*, (O 7.)—*Market* (E).—*Pleader*, (2 S 8.—3 M 9. 17. 39.)—*Trespass*, (B 4.)

PROROGATION.

Vide Parliament, (O 1, 2.)

PROTECTION.

Vide Abatement, (F 11.)

PROTEST.

Vide Merchant, (F 8, &c.)

PROTESTATION.

Vide Pleader (N).

PROTHONOTARY.

Vide Courts, (C 4.)

PROVISION.

Vide Provisor.

Provision for a Wife.

Vide Chancery, (2 M 12, 13, 14.—3 E 1, 2.—3 Z 1, &c.)

———— for Children.

Vide Chancery, (3 Z 4.—4 H 2.)

PROVISO.

Vide Condition, (A 2.)

P R O V I S O R.

(A) Provision.

(A 1.) How usurped.

I^N the time of *H. 1.* the pope usurped the donation to bishoprics, and all other ecclesiastical benefices. *Dav. 90. a. Vide Popery.*

And by a *can.* in the synod of London *A^o 1107*, with the king's assent, it was decreed, *quod nunquam per donationem baculi pastoralis aut annuli, quisquam per regem, aut aliam laicam manum investiretur in Anglia.* *Dav. 90.*

And in the time of *John*, the pope granted a general bull of provision for all the benefices in the kingdom. *Dav. 94. a*

So, in the time of *Ed. 2.* *Dav. 95. b.*

And in the minority of *Ed. 3.* the pope, by his bull, made an alien cardinal in *England*, and gave him power to provide for all ecclesiastical promotions, *cum vacare acciderint.* *Dav. 95. b.*

(A 2.) How restrained.

But by the *st. 25 Ed. 1.* (which was the first statute against provisors) it was declared a contempt of the crown, to bring in bulls of provision, &c. *Dav. 95. b.*

By the *st. 25 Ed. 3. st. 6.* (in which the former act is recited) the king and his subjects shall have the right of patronage; election of prelates shall be made according to the antient grants of the king: and no bull of provision shall be put in execution: but the provisor shall be attached, fined, and ransomed at the will of the king, and imprisoned till he renounce the benefit of his bull, gives satisfaction to the party grieved, and sureties that he will not afterwards offend. *Dav. 86. b.*

P R O V O C A T I O N.

Vide Justices, (M 9. 15.)

P R O X Y.

Vide Parliament, (D 19.)

P U B L I C A T I O N.

Publication of Depositions.

Vide Chancery (Q).

Publication of a Libel.

Vide Libel, (B 1, 2.)

Publication of Slander.

Vide Action upon the Case for Defamation, (G 4.)

Publication of a Will.

Vide Devise, (E 2, &c.).

PUIS DARREIN CONTINUANCE.

Vide Abatement, (I 24.)

PURCHASE, AND PURCHASER.

*Vide Capacity, (A 1, 2.—B 1, &c.)——Chancery, (I 1. 4.—H 3.
—4 I 1, &c.)——Discent (B).——Enfant, (B 1.)——
Franchises, (F 15, &c.)*

Purchasing a Title.

Vide Maintenance, (A 5.)

P U R L I E U.

Vide Chase, (I 1, 2.)

P U R P R E S T U R E.

(A) What shall be.

PURPRESTURE is derived from the word *pourpris*, which signifies an inclosure. *Co. L. 277. b.*

Purpresture is when a man, by building, inclosure, or unlawful using of any liberty, encroaches upon an highway, public river, or any demesne or land of the king, or another. *Co. L. 277. b. Manw. 172. 176. Nom. verb. Pourpresture.*

If a man builds an house upon his own soil, or the waste in a forest, it will be *purpresture*, and may be pulled down, or he may be fined at the discretion of the justices of the forest. *R. Dy. 240. b.*

So, if he erects a beacon there. *R. Dy. 240. b. in marg.*

Or, makes a causeway there. *Ibid.*

If the erection be upon the king's manor. *Jon. 277.*

If *purpresture* be by erection of cottages, &c. upon a forest within the king's manor; tho' the king grants the manor to *A.* it shall not be a dispensation of the *purpresture*; but it shall be pulled down in the hand of the patentee. *R. Jon. 277.*

Vide Chase (L).

P U R V E Y A N C E.

Vide Prerogative, (D 41, 42.)

QUALE JUS.

(A) When it lies.

A Recovery by default, tho' made by collusion, was not an alienation in *mortmain*, contrary to the *ft. Mag. Ch. 36.* or *ft. de Religiosis, 7 Ed. 1. 2 Inst. 429.*

And therefore, by the *ft. W. 2. 13 Ed. 1. 32.* it was enacted, that after judgment by default at the suit of an ecclesiastical person, *inquiratur per patriam, utrum petens habeat jus, vel non*; if found that he had right, *recuperet seisinam, &c.*; if he had no right, *incurratur domino feodi, &c.*

And by this statute, where an ecclesiastical person recovers by default, a writ of *quale jus* issues.

And this writ ought to issue regularly after the default and before judgment. *2 Inst. 430.*

QUALIFICATION.

Vide Esqglife, (N 8, 9.)

QUARENTINE.

The Writ *de Quarentinâ habendâ.*

BY the *ft. M. Ch. 9 H. 3. 7.* a wife shall have quarentine for forty days in the capital messuage of her husband, if it be not a castle. *Vide Dower, (A 11.)*

And if she be ousted, she shall have a writ *de quarentinâ habendâ*, which is *viscontiel*, and a commission to the sheriff to proceed thereon. *F. N. B. 161. E.*

And thereupon the sheriff shall make process immediately against the party, to answer in two or three days, and need not stay till the county court. *F. N. B. 162. A.*

QUARE CLAUSUM FREGIT.

Vide Pleader, (3 M 34, &c.)—Trespafs (B 1.—C 1.—D).

QUARE EJECIT INFRA TERMINUM.

(A) When it lies.

IF a lessor enters upon his lessee for years, and enfeoffs another in fee, or for life, &c. the lessee shall have against him a writ of *quare ejecit infra terminum*, and shall recover his term and damages. *F. N. B. 197. S.*

Or, if the term be determined, shall recover his damages. *F. N. B. 197. T.*

QUARE EJECTIT INFRA TERMINUM.

So, if the heir of the lessor enters, and makes a feoffment to another, &c. *F. N. B. 198. C.*

Or, the lord by escheat. *Semb. F. N. B. 198. F.*

So, if the lessee be ousted, and his lessor disseised by a stranger, and the lessor afterwards releases to the disseisor. *F. N. B. 198. H.*

So, if the lessor suffers a common recovery against him, tho' the lessee could not falsify such a recovery before the *st. 21 H. 8. 15. F. N. B. 198. E.*

So, if a lessee assigns his term, his assignee may have the writ of *quare ejectit infra terminum. F. N. B. 198. D.*

Or, against the survivor of four lessors, where the survivor alone enters, and makes a feoffment. *Ibid.*

So, the lessee of a villein, who purchases, and makes a lease before the entry of his lord. *F. N. B. 198. G.*

(B) How the Proceeding shall be.

A *Quare ejectit infra terminum* lies against the feoffee, &c. or against the lessor. *F. N. B. 197. S. 198. K.*

And tho' the writ supposes a sale to the feoffee, &c. yet the sale is not traversable, but the ejectment only. *F. N. B. 198. K.*

The process is summons, attachment, and distress infinite. *F. N. B. 197. V.*

But no process lies to outlawry, because the writ is not *vi et armis. Ibid.*

This writ was founded upon the *st. W. 2. 24.* which gives a writ *in consimili casu*; and because an ejectment does not lie by a lessee against the feoffee of his lessor, without entry, for that the lessor ousts him, and not his feoffee, this writ was contrived upon this statute to be brought against the feoffee, &c. *F. N. B. 198. A.*

(C) When this Writ lies, or an Ejectment.

BUT if the lessee after ouster and feoffment by his lessor enters, and the feoffee ousts him, the lessee may maintain an ejectment against the feoffee. *F. N. B. 198. A.*

So, if the feoffee be party or privy to the ouster by the lessor. *Ibid.*

So, a lessee, ousted by his lessor, may have an ejectment, or writ of *ejectit infra terminum* against him, or his heir, at the election of the lessee. *F. N. B. 198. K.*

So, against the lord by escheat, or lord of a villein, who leased to him; and that without a precedent entry. *Ibid.*

Ejectment.

QUARE IMPEDIT.

(A) What Remedy for a Church.

REMEDY by law was provided for the recovery of a church, or for the revenues of a church.

By

By the common law, there were three writs for the church itself, viz. right of advowson, *quare impedit*, and assize of *darrein presentment*. 2 *Inst.* 357.

For the revenues of the church, the parson had remedy for his lands and tenements by *juris utrum*.

(B 1.) Right of Advowson.

BY the common law, in all cases where the church was full by institution against a common person, or by institution and induction against the king, the rightful patron would lose the advowson, if he did not recover the inheritance of it by a writ of right of advowson. R. 6 Co. 49. 2 *Inst.* 357, 358. *Vide Advowson*.

Tho' the presentation upon which the church was full, was made by usurpation. *Vide Esglise*, (H 14.)

Tho' the patron was an infant, *feme-covert*, &c. 6 Co. 49.

But in all these cases the patron seised of the advowson in fee may have remedy by the writ of right of advowson. F. N. B. 30. B. F.

So, before the *st. de Donis*, 13 Ed. 1. a patron, who had a fee-simple conditional, if he was ousted of the advowson by usurpation, should have had a right of advowson.

So, if he who had a right to collate, was ousted by a plenary upon a collation without title, he should have had a writ of right. 6 Co. 50. a.

So, a right of advowson lies for the advowson of a vicarage, prebend, chapelry, &c. as well as of a church. F. N. B. 31. C. E.

So, if a parson, who sues in the spiritual court for tythes to the fourth part of the advowson in value, be prohibited by an *indicavit*, his patron shall afterwards have a right of advowson. F. N. B. 30. E.

So, it lies of a moiety, or third, or fourth part of a church. F. N. B. 30. D.

And, by common law, of a less part; but that is now ousted by *st. W. 2. 5.* F. N. B. 30. E.

So, if A. and B. are seised of an advowson, and to the heirs of B., they may join in a right of advowson for the benefit of him who has the fee. F. N. B. 30. F.

But a right of advowson does not lie by a tenant for life or years. F. N. B. 30. B.

Nor, by tenant by the curtesy, or in dower. *Ibid.*

Nor, by tenant in tail since the *st. de Donis*, tho' he has a fee expectant. *Ibid.*

So, if a man had purchased an advowson, to which he had never presented, he should not have had a right of advowson before the *st. W. 2. 5.*; but his advowson was lost. 2 *Inst.* 358.

(B 2.) How the Proceeding in it shall be.

(B 2.) *The count*, &c.] In a right of advowson, the process shall be summons and *grand cape*. *Vide Pleader*, (3 I 1, &c.)

And the summons shall be made upon the glebe, which shall be seised into the king's hands upon the *grand cape*. N. N. 69. c.

The plaintiff shall count of the possession of an ancestor, or his own possession. *F. N. B. 30. B.*

And ought to lay the *esplees* in the parson, in taking tythes, oblations, &c. *Ibid.*

The tenant shall come and make defence. *F. N. B. 30. C.*

And shall have a view of the church. *N. N. 70. a.*

So, he may join the *mise* by battle, or the grand assise. *F. N. B. 30. C.*

But in the case of the king, the tenant cannot tender a demy-mark, to inquire of the seisin alleged by the king in his count, as he may in the case of a common person. *F. N. B. 31. D.*

So, final judgment shall not be against the king, tho' the *mise* was joined between the king and the tenant. *Ibid.*

(C) Assise of *Darrein Presentment*.

(C 1.) When it lies.

AN assise of *darrein presentment* lies, where a man, or his ancestor, has presented to a church, and, upon a subsequent avoidance, another usurps upon him.

So, by the *st. W. 2. 5.* the heir, or he in reversion, shall not be prejudiced by a presentation by his guardian, or by tenant in dower, by curtesy, for life, or for years, or by the donee in tail, but that he may have such action possessory at his full age, or when the reversion comes into possession, as his ancestor might have had upon the last presentation in his time.

So, he shall have this writ, tho' the last presentation was made by tenant by the curtesy, in dower, for life, or for years; if those estates did not commence by the grant of the plaintiff himself. *F. N. B. 31. G.*

So, if a guardian made the last presentation in right of the plaintiff, then in his wardship. *F. N. B. 31. I.*

Or, a stranger by usurpation upon the plaintiff, then an infant. *Ibid.*

Or, a stranger, by usurpation in time of war, though the plaintiff was of full age. *Ibid.*

(C 2.) When not.

But an assise of *darrein presentment* does not lie by one coparcener against another. *F. N. B. 32. A.*

Nor, if tenant for life, or for years, claims by lease from the plaintiff himself. *F. N. B. 31. I.*

Or, if an infant purchases an advowson, and an usurpation be made upon him. *Ibid.*

Or, if an usurpation be upon a *feme-covert*, who purchased the advowson. *2 Inst. 360.*

So, if a purchaser be a bishop, abbot, &c. *2 Inst. 358.*

(C 3.) How the Proceeding shall be.

The proceeding in an assise of *darrein presentment* is conformable, in many respects, to the proceeding in an assise of *novel disseisin*. By

By the *st. M. Ch. 13.* it shall be *coram just. de Banco*; tho' before it lay in *B. R.* 2 *Inst.* 27.

So, plenarty is no bar in an assise of *darrein presentment*, any more than in a *quare impedit*, if it was not for six months before the writ purchased, by the *st. W. 2. 5.* 2 *Inst.* 360.

(D) Quare Impedit.

When it lies.

[A *Quare impedit* may be brought for a church and an hospital. *Bedford v. Lincoln, H. 19 Geo. 2. Willes, 608.*]

Quare impedit is an ancient writ, which lies by him, who, being in possession of an advowson of a church, is disturbed in his presentation to it. 2 *Inst.* 356. *Vide Pleader, (3 I 1, &c.)*

[If the right of nomination be in one, and of presentation in another, then, if either impede the other in his right, a *quare impedit* lies. 3 *Term Rep.* 646.]

So, by the *st. W. 2. 13 Ed. 1. 5.* if any, not having right, present during the minority of an infant, in the time of tenant in dower, by the curtesy, for life, for years, in the time of tenant in tail, &c. the infant at full age, he in reversion, and the issue in tail, may have the same remedy for recovering the possession of the advowson, as his last ancestor, &c. might have had in his time. The same remedy is for a *feme-covert*, or men of religion, if the usurpation be during coverture, or vacation. 2 *Inst.* 353.

And therefore an infant, who has an advowson by descent, after his full age shall have a *quare impedit* or *darrein presentment*, tho' the usurpation was upon him during his minority. 2 *Inst.* 358, 359.

So, an infant may have it during his minority, when he is out of wardship. 2 *Inst.* 359.

So, an infant shall have a *quare impedit*, if an usurpation be upon him, tho' his ancestor purchased, and never presented to the advowson. *Ibid.*

So, the heir of him in reversion, after an usurpation in the time of tenant by the curtesy, in dower, for life, for years, tenant by statute-merchant, staple, or *elegit*. 2 *Inst.* 359. *Jon.* 48.

So, the issue in tail, after an usurpation in the life of tenant in tail. 2 *Inst.* 359. *Jon.* 49.

So, the successor of him in reversion, if an usurpation be upon the lessee, &c. of an ecclesiastical person. *Semb. Jon.* 48.

But if an infant purchases an advowson, and an usurpation be upon him, he is not within this statute. 2 *Inst.* 358.

So, the lessor himself is not within the statute, tho' the heir is, when the usurpation is upon his lessee, &c. 2 *Inst.* 359.

Nor, a man in remainder, or his heir. *Ibid.*

So, a *feme-covert* shall not have aid by the statute, if an usurpation be, during the coverture, to an advowson purchased by her. *Jon.* 49.

So, if an usurpation be upon a bishop, or other ecclesiastical person, his successor shall not have a *quare impedit*; for the statute aids only upon an usurpation in the vacation, or when the ancestor could not have remedy at the time of the usurpation. *Semb. Jon.* 47. 49. *F. N. B.* 34. *M.*

Vide Quare non admittit.—Pleader, (3 I 1, &c.)

(E) Juris Utrum.

When it lies.

A *Juris utrum* is the highest writ which a parson can have. *F. N. B. 48. R.*

And it lies where the lands and tenements of a rectory are aliened by the predecessor of the parson. *Ibid.*

Or, are recovered against the predecessor by verdict, or by confession or default, without praying in aid of the patron and ordinary. *F. N. B. 48. R. 49.*

So, if the predecessor be disseised of his lands or tenements, *F. N. B. 49. A.*

Or, any intrudes upon them after the death of the predecessor. *Ibid.*

So, an abbot, prior, &c. being *parson imparsonne* of a church, shall have a *juris utrum*. *F. N. B. 49. E.*

So, a dean and chapter, prebendary, vicar, &c. *F. N. B. 49. M. N. O.*

QUARE INCUMBRAVIT.

(A) When it lies.

IF the plaintiff, in a *quare impedit*, sues a *ne admittas* within six months, and afterwards recovers, and before judgment the bishop had instituted another to the church, he shall have a *quare incumbravit* against the bishop, and shall recover his presentation and his damages. *F. N. B. 48 I. O.*

So, every party, who sues a *ne admittas*, may have a *quare incumbravit* after his recovery, if the church be full by the presentation of another.

Tho' the bishop admits the presentee of him, who is found patron by a *jure patronatus*. *F. N. B. 48. H.*

Or, if the bishop admits the clerk of a stranger, as well as of the party to the writ. *F. N. B. 48. L.*

Or, admits after six months, as well as before. *F. N. B. 48. L.*

Tho' the bishop presents the clerk of the plaintiff. *N. N. 111. b.*

So, a *quare incumbravit* lies, if the bishop incumbers, when no *quare impedit* is pending, and no debate for the church. *N. N. 111. a.*

Or, before judgment given. *N. N. 111. b.*

(B) How the Proceedings shall be.

THE *quare incumbravit* is an original writ, which issues out of Chancery, and not out of the court where the recovery was. *F. N. B. 48. G.*

And it ought to be sued in the county where the church is. *F. N. B. 48. D.*

And in the court where the recovery was, if the record remains there. *F. N. B. 48. F.*

But the king may sue a *quare incumbravit* in *B. R.* though the recovery was in *C. R.* *F. N. B. 48. E.* So,

So, a common person, if the record be removed there by error. *F. N. B. 48. F.*

The process shall be an *alias*, and then a *disfringas*. *F. N. B. 48. P.*

The plaintiff in a *quare incumbavit* ought to mention his recovery in his writ and count. *Per meliorem opinionem. F. N. B. 48. K.*

Or, if there be no recovery, he may have a special count. *N. N. 111. a.*

The defendant may demand *oyer* of the recovery mentioned in the count. *N. N. 111. b.*

The defendant may plead that he did not incumber since the prohibition delivered. *F. N. B. 48. N.*

But the plaintiff in his count need not say where he recovered. *N. N. 111. b. 112. b.*

Or, whether he recovered, since, or before the six months. *N. N. 111. b.*

Or, that the bishop refused his clerk; for if he incumbered, it imports it.

If the plaintiff be nonsuit, he may have another *quare incumbavit*, and vary his count. *F. N. B. 48. M.*

(C) When it does not lie.

BUT none shall have a *quare incumbavit*, except after a recovery in a court. *F. N. B. 48. E.*

Nor, if a church be incumbered before a *ne admittas* sued. *F. N. B. 48. H.*

So, a *quare incumbavit* does not lie, if the bishop, after the six months, collates by lapse. *F. N. B. 48. L. N. N. 112. a.*

So a *quare incumbavit* does not lie, if the bishop incumbers, pending a right of advowson, tho' the plaintiff recovers; for the plaintiff in a right of advowson cannot have a *ne admittas*; for he recovers the advowson only, and not the presentation, *F. N. B. 48. Q.*

QUARE NON ADMISIT.

(A) When it lies.

AFTER a recovery in a *quare impedit*, if the bishop refuses to admit the clerk of the plaintiff, he shall have an *alias*, *pluries*, and attachment, or at his election a writ of *quare non admisit*; in which he shall recover damages only for the refusal. *F. N. B. 47. C. G.*

And it lies, upon a recovery by the king, as well as by a common person. *F. N. B. 47. C. D.*

And it may be sued out of *Chancery*. *F. N. B. 47. C.*

Or, out of *C. B.* which, in term, is most proper. *F. N. B. 47. C.*

And it lies against a bishop, upon a refusal by his vicar-general. *F. N. B. 47. I.*

So, upon his refusal, tho' he afterwards admits him. *F. N. B. 47. L.*

So, it lies against the guardian of the spiritualties upon a refusal by the bishop then dead. *F. N. B. 47. I. Q.*

Or, against the official of the bishop. *F. N. B. 47. N.* A *quare*

QUARE NON ADMISIT.

A *quare non admisit* shall be sued in the county where the refusal was. *F. N. B. 47. F.*

And by a common person in *B.*; or, if the judgment be affirmed in error, in *B. R.* *F. N. B. 47. E.*

But by the king it may be in *B. R.* as well as in *C. B.*, tho' no error brought. *F. N. B. 47. D.*

The writ ought to recite the recovery. *F. N. B. 47. C.*

But it will be a good plea for the bishop, that the church is litigious. *F. N. B. 48. B.*

That the church is full, of another presentation by any one not party to the record. *F. N. B. 47. K.*

That he himself presented by lapse. *F. N. B. 47. M.*

That he has admitted his clerk. *F. N. B. 47. H.*

So, it does not lie against an archdeacon for refusal of induction; for the plaintiff shall cite him into the spiritual court, or have an action upon the case. *F. N. B. 47. H.*

Nor, upon a recovery of a presentation to a donative; for he shall have a writ to the sheriff to put him into possession. *F. N. B. 48. A.*

Or, a writ to him who ought to instal, &c. the presentee to the donative, to put him into possession. *F. N. B. 48. C.*

QUARE OBSTRUXIT.

(A) The writ of *Quare Obstruxit*.

A *Quare obstruxit* is a writ, which lies against him who obstructs the plaintiff's way, to which he has a right in the land of another. *Nom. verb. Qu. Obstruxit.*

And it lies in the nature of a writ of *right close* directed to the lord or bailiffs of a manor of *antient demesne*. *F. N. B. 11. I. L.*

QUARTER SESSIONS.

Vide Justices of Peace, (D 1, &c.)

QUE EST EADEM.

Vide Pleader, (E 31.)

QUEEN.

Vide Action, (B 2.—C 2.)—Justices, (K 1, &c.)—Roy, (F 1, 2, 3.)

QUE ESTATE.

Vide Pleader, (E 23, 24.)—Temps, (G 13.)

QUEM REDDITUM REDDIT.

Vide Fine (F).

QUESTION.

Vide Parliament, (G 25, &c.)

QUIA DOMINUS REMISIT CURIAM.

Vide Droit, (C 2.)

QUID JURIS CLAMAT.

Vide Fine (F).

QUI ETUS.

WHEN an accountant in the *Exchequer* is acquitted, he shall have his *quietus*.

As to a sheriff's *quietus*, *vide Viscount, (G 4.)*

QUI TAM, &c.

Vide Action upon Statute, (E 1, &c.)—Information, (A 3.)

QUIT-RENT.

Vide Rent, (C 2.)

QUOD EI DEFORCEAT.

(A) When it lies.

(A 1.) By the Common Law.

BY the custom of some places a *quod ei deforcean* lies at common law; as, in *Wales*. 2 *Inst.* 350. *R. Jon.* 381.

So, by the common law, if a recovery was against the husband in a real action by render of the husband, his wife might recover her dower. 2 *Inst.* 349.

Yet, in the superior courts no *quod ei deforcean* lies by the common law. 2 *Inst.* 350. *Jon.* 381.

(A 2.) By the *st. W.* 2. 4.

But now by the *st. W.* 2. 4. if a recovery be against the husband by default, his wife shall have a *quod ei deforcean*; and if the tenant cannot shew that he had right to the tenement at the time of the recovery, the wife shall have her dower. *Vide* 2 *Inst.* 349.

QUOD PERMITTAT.

(A) When it lies.

A *Quod permittat* lies against him who disturbs another in his right to common of pasture, turbary, piscary, aqueduct, way, fair, market, or other privilege. *F. N. B.* 123. *F. H.*

As,

As, for disturbing in his *estovers*. *F. N. B. 123. H.*

Or, disturbing the villeins of a lord in doing suit at his mill, where they ought to do it by prescription. *F. N. B. 123. M.*

Or, disturbing in having water to his fountain, where he ought to have it. *F. N. B. 124. A.*

Or, in his passage *ultra aquam*. *Ibid.*

In his free foldage. *Ibid.*

In the erection of ladders in the soil of another, for repairing an house contiguous. *Ibid.*

In his corody. *Ibid.*

So, a *quod permittat* lies for abating a nuisance in the freehold of another. *F. N. B. 124. H. Vide Action upon the Case for a Nuisance, (D 2.)*

(B) By whom it lies.

A *Quod permittat* lies upon a disturbance, or *disseisin* to the plaintiff, or his ancestor; but in no other degree. *F. N. B. 123. H.*

And when it is brought upon a *disseisin* to the ancestor, it is in the nature of a *mortd'ancestor*. *F. N. B. 123. K.*

So, an abbot, &c. might have had it, upon a *disseisin* to his predecessor. *F. N. B. 123. H. L.*

A *quod permittat* lies by tenant in fee, or in tail. *F. N. B. 124. B. C.*

So, it lies by the heir, or feoffee of him to whom a nuisance is done. *F. N. B. 124. H. 125. A.*

So, a *quod permittat* lies against the heir, or feoffee of him who did a nuisance to the freehold of another, if the nuisance be continued. *F. N. B. 124. H. 125. A.*

(C) When it does not lie.

BUT a *quod permittat* does not lie for reasonable *estovers* in a wood, &c. for which an assise of *novel disseisin* is given by the *st. W. 2. 26. F. N. B. 124. A.*

(D) How the Proceeding in it shall be.

(D 1.) By *Justices* in the County.

A *Quod permittat* is *vicontiel* before the sheriff by *justices* in his county-court; or it may be sued in *C. B.* *F. N. B. 123. G.*

(D 2.) By Writ in *C. B.*

A *quod permittat* by writ in *C. B.* lies against a disseisor, or disturber of his common, way, &c. upon a *disseisin* to the plaintiff himself, or his ancestor. *F. N. B. 123. H.*

If the common be in the land of a person certain, he need not mention in his writ the number of cattle. *F. N. B. 123. G.*

(D 3.) The Process.

The process in a *quod permittat* is summons, attachment, and *distingas*. *F. N. B. 124. F.*

And

And if *nihil* be returned upon the summons, a *capias* shall go. *F. N. B.* 124. *F.*

Q U O J U R E.

(A) When it lies.

A *Quo jure* is a writ of right in its nature, and lies by the lord of a vill, or of a waste, or by any seised in fee, against him who claims common in his land. *F. N. B.* 128.

(B) How the Proceeding shall be.

THE process in a *quo jure* is summons, attachment, and distress. *F. N. B.* 128. *L.*

And if the defendant makes default after appearance, the grand distress shall go instead of a *petit cape*. *F. N. B.* 128. *L.*

The defendant shall make his defence, shall make title to the common, shall allege seisin of it, and the *esplees*, and *quod tale sit jus suum offert*, &c. as the demandant does in a writ of right. *F. N. B.* 128. *I.*

To the title alleged by the defendant, the plaintiff shall make defence, and shall defend against the seisin alleged by the defendant, and shall join the *mise* upon the mere right, or by battle. *F. N. B.* 128. *I.*

Q U O W A R R A N T O.

(A) When it lies.

A *Quo warranto* is in the nature of a writ of right for the king, against him who usurps or claims any franchises or liberties, to say by what authority he claims them. 2 *Inst.* 282. 9 *Co.* 28. *a.* *Yel.* 191.

So, the king may have an information in the nature of a *quo warranto*.

Or, a writ of inquiry out of the *Exchequer*. *Co. Ent.* 530. *b.*

A *quo warranto* lies for all franchises.

As, for waifs, estrays, &c. *Co. Ent.* 528. 541. 544.

Goods and chattels of felons, deodands, &c. *Co. Ent.* 528. 549.

Fines, amerciaments, issues, &c. *Co. Ent.* 551. *b.* 561. *a.*

A park, warren, &c. *Co. Ent.* 561.

So, for wreck of the sea, &c. 2 *Rol.* 205. *l.* 35.

Or, for taking lastage or ballastage of ships. 1 *Sid.* 86.

So, it lies for franchises, which cannot be seised into the king's hands; for the party may be ousted of them.

As, for a court-baron. *Quo. W.* 14. *Treby's argument.* Per three *J.* two *dub.* 2 *Cro.* 259. *Yel.* 190.

A court-leet, or borough-court. *Co. Ent.* 527. *b.* 544.

A fair, market, toll, &c. *Co. Ent.* 527. *b.* 544. 561. *a.*

[Inform-

[Information in the nature of *quo warranto* lies against any one claiming an *exclusive* ferry over a public river, but not for taking money of passengers. *Rex v. Reynell*, H. 15 G 2. Str. 161.]

So, it lies for claiming to be a corporation. *Co. Ent.* 527. b.

To chuse bailiffs, or other officers. *Co. Ent.* 527. b. 537. b.

Coroner, constable, clerk of a market, justice, &c. *Co. Ent.* 528. a. 537. b. 551. b.

[For exercising the office of steward of a court-leet, but not of a court-baron. *Rex v. Hulston*, H. 11 Geo. Str. 621.]

[It lies for the office of constable. *Rex v. Goudge*, M. 18 Geo. 2. Str. 1213.]

So, it lies upon a claim of exemptions; as, to be exempt from the government of the mayor, justices, &c. *Co. Ent.* 528. a.

So, a *quo warranto* lies against him who abuses his franchises, or liberties. 2 *Inst.* 496. 2 T. R. 567.

So, it lies upon a claim of the correction of others; as, to have the assise of bread and beer, weights or measures. *Co. Ent.* 528. a.

To have a prison, power of arresting, &c. *Ibid.*

Punishment of forestallers, or other offenders. *Ibid.*

Pillory, tumbrel, &c. *Co. Ent.* 551. b.

[It lies where any new jurisdiction, or public trust, is executed without authority, tho' it is no usurpation upon any franchise of the crown. *Rex v. Nicholson*, P. 6 Geo. Str. 299. *Rex v. Boyles*, T. 3 Geo. 2. Str. 836. *Ld. Raym.* 1559.]

[An information in nature of *quo warranto* lies against a portreeve of a borough and manor, who, as portreeve, is the returning officer of the borough. *Rex v. Mein*, E. 30 Geo. 3. 3 T. R. 596.]

[If the affidavit in support of the rule omit a material fact, which is stated in the affidavit filed on the other side, the latter affidavit may be read by the prosecutor in support of his rule. *Ibid.*]

[In general the title of the electors is not to be brought in question by attaching the person elected by them; but this rule does not apply where is no method of prosecution by which the title of the electors may be questioned in the first instance. *Ibid.*]

(B) When not.

BUT by the *st.* 18 Ed. 1. of *quo warranto*, every one who had a franchise before the time of R. 1. and can prove his enjoyment afterwards, by verdict, or other means, his franchise, &c. shall be confirmed.

And therefore, if it appears upon a *quo warranto*, that the defendant has enjoyed time whereof, &c. franchises, &c. which lie in prescription, or those which lie in charter, by grant within the time of R. 1.; or, if granted before, if they be confirmed or allowed since, he shall not be ousted of them. 2 *Inst.* 495. 9 Co. 28.

[It does not lie for erecting a warren. *Rex v. Lowther*, M. 12 G. Str. 637. 2 *Ld. Raym.* 1409.]

[It does not lie for a forfeiture by non-attendance. *Lord Bruce's case*, M. 2 Geo. 2. Str. 819.]

[The court will not grant information *quo warranto* for making a rabbit-warren, nor for setting up a fair; the remedy is, by application to attorney-general, who may grant it. *Ibson's case*, P. 9 Geo. 2. B. R. H. 261.]

Nor,

[Nor, for holding a court-leet in a manor; for it is a private right, and may be had in a civil action. *Rex v. Cann*, T. 10 & 11 Geo. 2. *Andr.* 14.]

[Nor, where two sets of churchwardens are sworn in. *Rex v. Dawbeny*, M. 17 Geo. 2. *Str.* 1196.]

[Nor, to try the validity of an election to the office of churchwarden. M. 32 Geo. 3. 4 T. R. 381.]

[Nor, where the defect of defendant's title is stale, as of twenty-nine years' standing, and has never been questioned before. *Rex v. Stephens*, M. 31 Geo. 2. 1 B. M. 433. Or, within twenty years. *Cowp.* 59. *Dougl.* 81. (3 T. R. 310.) 4 Burr. 2523. 1 T. R. 3.]

[But possession of a corporate franchise for less than twenty years, is not of itself a sufficient objection to an information in the nature of *quo warranto*, to try the validity of a title to such franchise. 2 Term Rep. 767.]

[The time for applying for an information in nature of a *quo warranto* was restrained to six years, by a rule of Hilary Term 1791. 4 T. R. 282.]

[It is enacted by *stat.* 32 Geo. 3. c. 58. that defendants to informations in the nature of *quo warranto*, for the exercise of any office, may plead the holding it six years or more; and if upon issue joined the plea is found for the defendant, he shall be entitled to judgment.]

(C) The Proceeding in a *Quo Warranto*.

(C 1.) In what Court it shall be.

BY the *st.* made 6 Ed. 1. (but proclaimed 30 Ed. 1. and therefore printed of that year, 2 *Inst.* 279.) all persons ought to enjoy their franchises, if not usurped over, till the coming of the king or justices in eyre.

And thereby, and by the *st.* 18. Ed. 1. when justices in eyre were in being, a *quo warranto* lay before them. 2 *Inst.* 498.

(C 2.) What Process.

By the *st.* 6 Ed. 1. (printed 30 Ed. 1.) the sheriff shall make proclamation forty days before the eyre, that all appear to shew *quo warranto* they claim their franchises; and if any makes default, his franchise shall be seized into the king's hands, till he appears, *nomine districtionis*, and then replevied, if he answer immediately; if he excepts, that he ought not to answer without an original, it shall be inquired, whether he himself usurped; and if found so, he shall answer immediately without an original; if he found that his ancestor died seized of the franchise, an original shall be sued in this form; *Rex, &c. sum per bonos summonitores A. quod sit, &c. ostensurus quo warranto tenet, &c.*

If A. appears upon the original he shall answer, and replication and rejoinder shall be made. By the *same statute*.

If he does not appear, nor is essoined, it shall be as in eyre. By the *same statute*.

And therefore, the first process against the defendant in a *quo warranto* is summons. 1 *Sid.* 86.

If he does not appear thereon, judgment shall be for seizure. 1 *Sid.* 86. 2 *Rel.* 46.

So,

So, in an information in the nature of a *quo warranto*, the first process shall be a *venire facias*. *Co. Ent.* 527. b. 1 *Sid.* 86.

If the party does not appear the same term, he shall lose his franchise for ever. 2 *Inst.* 282.

If he does not appear upon the *venire facias*, there shall be a *distingas*. 1 *Sid.* 86. 1 *Sal.* 374.

If he appears, his franchises shall be replevied of right. 2 *Inst.* 282.

If an information be against a corporation, the first process shall be summons, and afterwards *distingas in infinitum*. *Carth.* 503.

And fifteen days are sufficient between the *teste* and return. *R. Carth.* 503.

And if there be no appearance upon the *distingas*, the issues may be estreated. *R. Carth.* 503.

So, upon an inquisition returned into the *Exchequer* of an usurpation of franchises, a *distingas* shall issue against the usurper, who thereupon may appear and plead. *Co. Ent.* 531.

If an usurpation be by a corporation, process shall be against them by their corporate name. 2 *War.* 16. *Treby's argument*. *Vide post.* (C 3.)

If it be for usurping to be a corporation, it shall be against the natural persons who usurp, or by a name which comprehends them. 2 *War.* 415. *Treby's argument*.—*Quo W.* 69. *Pollexfen's argument*. *Vide post.* (C 3.)

(C 3.) Information.

The general proceeding is by information for the king, by his attorney-general, against any usurper of franchises, &c. to show *quo warranto* he uses them. *Co. Ent.* 527. b.

So, against him who exercises a power unlawfully; as, if a mayor, &c. admits to freedom persons who have no right; for there is no other remedy. 1 *Sal.* 374.

[And even after twenty years quiet possession, the king may prosecute by his attorney-general. 1 *Term Rep.* 3.]

By the *st.* 9 *Ann.* 20. an information in the nature of a *quo warranto* may be granted by leave of court, at the relation of any desiring to sue, against any, who intrudes into, usurps, unlawfully holds, or executes any offices, or franchises of a corporation.

[Information on this statute lies not against a corporation as a body, but only against individuals usurping franchises in a corporation. Information against a corporation is always by the attorney-general. *Rex v. Curmarthen*, *M.* 33 *G.* 2. 2 *B. M.* 869.]

[And these informations are no longer granted as of course; but the court will consider all the circumstances of the case, before they disturb the peace of corporations, 1 *Term Rep.* 3.]

And where the rights of several persons may be properly tried in one information, the court may order one against several.

[After rules are made absolute for four informations against four defendants, the court may direct that there shall be only one information against all the four defendants. *Rex v. Foster*, *P.* 31 *G.* 2. 1 *B. M.* 573.]

If an information be for using a franchise by a corporation, it ought to be against the corporation. 2 *Rol.* 115.

If for usurping to be a corporation, it ought to be against the particular persons. 2 *Roll.* 115.

[If it does not appear whether a court, at which election was made, was competent or not, the court will grant information; or where any other material points are doubtful. *Rex v. Latham*, P. 4 G. 3. 3 B. M. 1485.]

[Whether B. R. can grant it on the application of a private person, for usurping a market upon the crown. *Dub. Rex v. Marsden*, M. 6 G. 3. 3 B. M. 1812.]

[The court will not grant it on oath of belief of non-residence, defendant swearing to his residence, and paying scot and lot, and the rule may be discharged with costs. *R. v. Wardroper*, M. 7 G. 3. 4 B. M. 1963. 2024.]

[The defendant having prior connections with a borough town, previous to his election to the office of bailiff, for which residence is a necessary qualification, took a house at first for four years; but afterwards, at his landlord's request, for one, and slept there one night before the election, and did not return for near a month, when he stayed two days, but retained possession of his house under his lease the whole time; the taking of the house appearing to the court to be *bonâ fide*, was holden a sufficient legal residence to satisfy the qualification required. *Rex v. Sargent*, B. R. M. 34 G. 3. 5 T. R. 466.]

[An information was granted in order to try whether a residence, in a borough previous to an election, which required residence, were *bonâ fide* or not: it appearing that the defendant, tho' in treaty for a house in the borough, had only hired lodgings there, and had resided there a very few nights in his journey to and from other places. *Rex v. Richmond*, H. 36 Geo. 3. 6 T. R. 560.]

[The court will not grant it if the informant hath acquiesced in the usurpation, and is partaker of the guilt, or shews no right of himself or others, which depends on invalidating defendant's title, or the objection cured by long subsequent conduct, or the consequence prove fatal to the corporation which has been drawn into acts by the informant which he would now turn to their destruction. *Rex v. Dawes*, *Rex v. Marten*, H. 7 G. 3. T. 7 G. 3. 4 B. M. 2022. 2120. 1 *Term Rep.* 3, 4.]

[And the circumstance of the relator's standing in the same situation with the defendant, or its appearing that the corporation must necessarily be dissolved, by impeaching the defendant's title, and the title of those who claim under him, will govern the discretion of the court, in refusing such an application. 2 *Term Rep.* 767.]

[An application for an information made on the affidavits of several persons, of whom all but one have consented to the election proposed to be impeached, may be granted on the affidavit of that one, if he avow himself to be the relator. *Rex v. Symmons*, E. 31 Geo. 3. 4 T. R. 223.]

[The court will not permit a corporator to file an information against another for a defect of title, which equally applies to his own, or to the title of those under whom he claims. *Rex v. Cudlipp*, H. 36 Geo. 3. 6 T. R. 503.]

[After the death of a mayor, the court will not grant an information to impeach a derivative title, where the mayor died in the undisturbed possession of it. 1 *Term Rep.* 4. *Quare.*]

[The court will not grant an information to impeach a derivative title,

title, if the person claiming the original title has been in the undisturbed possession of his office six years. *Rex v. Peacock, E. 32 Geo. 3. 4 T. R. 684.*

[The court will not decide the validity of the election of a corporator, if the question be new or doubtful, or a rule to shew cause for an information in the nature of a *quo warranto*. *Doug. 397.*]

(C 4.) Plea, &c.

By the *st. 9 Ann. 20.* the defendant shall plead the same term the information is exhibited by that statute, unless the court gives further time.

[After a defendant has appeared, the prosecutor must give two four-days' rules to plead, and after the expiration of the last, must also move in term time for a peremptory rule to plead, otherwise the defendant has until the next term to plead. *Rex v. Ginever, H. 36 Geo. 3. 6 T. R. 594.*]

And the defendant may disclaim the liberties mentioned in the information. *Co. Ent. 527. b.*

Or, disclaim as to part, and justify as to other part. *Co. Ent. 529. b.*

After plea, the defendant may amend his plea, paying costs, before demurrer joined. *1 Sid. 54.*

[At any time before trial, the court will give leave to defendant to withdraw his plea and plead *de novo*, on terms. *Rex v. Blatchford, H. 8 G. 3. 4 B. M. 2147.*]

So, the defendant in a *quo warranto* may by plea shew his title to the liberties claimed.

And in such case he ought to shew a full title to himself. *9 Co. 24. b. R. 2 Leo. 28. Hard. 456.*

As, if the king grants *bona felonum*, or other franchises, which lie in charter, to an abbot, &c. whose possessions come back to the crown, and the king re-grants *bona felonum*, &c. *adeo plene prout abbas habuit*; in a *quo warranto* against the grantee, the defendant ought by his plea to shew the first grant to the abbot, the re-union in the crown, and afterwards the re-grant, &c. *R. 9 Co. 26. a. Per Popham, two J. cont. Mo. 297.*

If he pleads the king's charter, he ought not to plead that he granted and confirmed; for that is double. *1 Sid. 86.*

If he pleads a grant of an office, he ought to shew it to be an ancient office. *Semb. 1 Sid. 86.*

He ought to allege the thing done to be appurtenant to his office. *1 Sid. 86.*

If he pleads a grant to an abbot, &c. he ought to shew for what estate. *R. Mo. 297.*

If he shews a privilege to him as a copyholder, he ought to plead it in him who has the freehold at least. *R. Tel. 191.*

But it is sufficient, that the plea be as general as the information; as, if a *quo warranto* be for using a market, toll, &c. it is sufficient to make title to the market, toll, &c. without saying how much the toll was. *Pal. 81.*

If he claims a franchise as appendant to a manor which came to the king by the attainder of B. and afterwards was granted to him; it is sufficient to say that *B. fuit debito modo attinctus*. *Semb. 3 Leo. 72.*

So,

So, if he claims franchises by prescription, and others by charter, he may conclude *eo warranto utitur* generally; for it shall be taken distributive. *R. Mo.* 398.

[If the affidavit annexed to a plea in abatement has no title, the plea shall be set aside. *Rex v. Jones, H. 15 Geo. 2. Str.* 1161.]

[In *quo warranto* against particular members, the title of other members *de facto* cannot be discussed. *Cowp.* 508.]

[And where the right of election is in freemen in their corporate capacity, the question, Whether they were duly chosen or not? is not to be tried at the election of a third person. *Cowp.* 507.]

[Where a voter is in possession, the rights of the electors cannot be discussed in a trial of the rights of the elected, at least without notice. *Cowp.* 503.]

[To prove the existence of an aggregate corporation consisting of different incorporated trades, entries of admission into the several trades are admissible evidence. *Doug.* 374.]

(C 5.) Judgment.

In a *quo warranto*, there shall be judgment immediately for the king, if the defendant disclaims. *Co. Ent.* 527. b.

If the king cannot have the franchise claimed, judgment shall be that the defendant be ousted of it. *Co. Ent.* 527. b. 530. *Per Holt, Sho.* 280. 4 *Mod.* 58. 2 *Mod. Ca.* 234. 2 *Cro.* 260.

So, in an information for using an authority to which he has no right. 1 *Sal.* 374.

If a franchise, or liberty, which may subsist in the crown, be forfeited, the judgment in a *quo warranto* for it, either for seising or ousting, will be proper. *Per Holt, Sho.* 280.

If the franchise was created by the king, and may subsist, &c. the judgment for seisure will be the most proper. *Sho.* 280.

So, judgment shall be, for seisure of the franchise into the king's hands, in a *quo warranto* for a franchise not granted by the king. 1 *Sal.* 374.

If judgment be for seisure of the franchise, all franchises incident, or subordinate, granted by the same charter, are also forfeited. *R. Pal.* 82.

So, by the *st. 9 Ann.* 20. if the defendant, on information pursuant to that statute, be found guilty of usurpation, intrusion into, unlawful holding, or executing any offices or franchises there named, the court may give judgment of *ouster* as well as fine, and costs shall be recovered on either side.

If the defendant be found duly elected, but not sworn into the office, there shall be judgment of *ouster*. 2 *Mod. Ca.* 234. [*Mayer of Penryn's case, P. 10 Geo. Str.* 582. *Affirmed in Parliament.*]

[There must be an *user* as well as a *claim* of a franchise in order to found an application for an information in nature of *quo warranto*, for the judgment is, that he shall be fined *pro usu et usurpatione*. *King v. Ponsonby, 25 Geo. 2. Say.* 245. *Bull. Ni. Pri.* 211.]

[The stating that the defendant, who was elected to an office, had tendered himself to be sworn into it, is insufficient. *King v. Whitwell, M. 33 Geo. 3. 5 Term Rep.* 85.]

And no *mandamus* lies to swear, till that judgment be reversed. 11 *Geo. 1. 2 Mod. Ca.* 334.

So, if the attorney-general confesses the defendant's plea, there shall be judgment for the allowance of the franchises. *Co. Ent.* 535. *b.* 537. *a.* 549. 564.

But a confession by the attorney-general does not bind the king, where the matter is not private, but concerns the public. *1 Rol.* 112.

So, a confession by the attorney-general, if it be not after a plea upon record, does not warrant the court to give judgment against the king. *Semb. Sav.* 19.

So, a confession by the attorney-general does not conclude the king, or the court, in a point of law; but only as to the fact. *R.* 2 *Bul.* 296.

[If defendant confesses usurpation for part of the time only, and from thence insists on election, there cannot be judgment of *ouster*, but only *capiatur pro fine*. *Rex v. Biddle*, *T. 6 Geo. 2. Str.* 953.]

[If a mayor suffers judgment to go against him by default, tho' his whole expences are offered to be paid, whereby the rights of others are affected, judgment may be set aside, and another person admitted to defend in his name indemnifying him. *R. v. Dawes*, *H. 9 G. 3. 4 B. M.* 2277.]

[The defendant must shew a title, nor need the king traverse any thing but the title set up; if one material issue is found for the crown, the crown must have judgment. *Rex v. Leigh*, *H. 8 Geo. 3. 4 B. M.* 2143.]

(C 6.) *The effect of the judgment.*] The judgment in a *quo warranto* is final; for it is in the nature of a writ of right. *1 Sid.* 86.

And therefore, if judgment be against the king, the king shall be for ever bound, as to the thing adjudged. *1 Rol.* 112.

So, if judgment be against the king upon a confession by the attorney-general, it shall never afterwards be re-examined for a matter in fact; for as to the fact it is conclusive, tho' not as to the law. *Hard.* 129.

But upon a judgment against a corporation for seising of their liberties, the corporation shall not be seised or dissolved. *4 Mod.* 58.

And there cannot be judgment against a corporation but in their politic capacity. *4 Mod.* 58.

(C 7.) Execution.

After judgment for seizure of liberties into the king's hands, a writ of seizure shall issue to the sheriff. *Co. Ent.* 539. *b.*

And thereon the sheriff shall return a seizure. *Co. Ent.* 540. *b.*

R A P E.

Vide Appeal, (A 3.)—*Justices*, (S 2.—Y 12.)

RATIONABILIBUS DIVISIS.

Vide Droit (L).

RAVISHMENT OF WARD.

Vide Guardian, (H 3.)

R A Z U R E.

Vide Abatement, (H 1.)—Amendment, (T 6.)—Fait, (F 1.)

R E A D I N G.

Reading a Deed.

Vide Fait, (B 2.)

Reading a Bill.

Vide Parliament, (G 12. 14, 15.)

R E B E L L I O N.

Commission of Rebellion.

Vide Chancery, (D 5.)

R E B U T T E R.

Vide Garranty, (K 3.)—Pleader (K).

R E C A P T I O N.

Vide Pleader, (3 K 32.)

R E C E I P T.

(A) Receipt; when allowed.

(A 1.) Of a Termor for Years.

RECEIPT is, when, in an action between others, a stranger prays to be received to defend his right, or interest.

As, by the *st. Gloc. 11.* (which is the first statute which gives receipt) *2 Inst. 323.* if the tenant of the freehold is impleaded by collusion to oust a termor of his term, he, before judgment, may challenge his term.

And therefore, where the tenant of the freehold makes default, or renders the land, or says nothing, he who has a term by deed, may pray to be received to defend his interest. *2 Inst. 323.*

So, tenant by statute-merchant, staple, *elegit*, &c. *2 Inst. 323.*

So, if the tenant vouches *A.* who enters into warranty, and afterwards makes default. *2 Inst. 324.*

So, a tenant for years may be received in dower; tho' the writ be against him and another. *R. 3 Leo. 168.*

And therefore, he who prays to be received before judgment, suggests a collusion between the plaintiff and defendant. *Rob. Ent. 253.* *R.* that it ought to be suggested; but all, except *Anderson*, agreed, that it is not traversable. *R. 3 Leo. 168, 9.*

But a tenant for years shall not be received upon the *st. of Gloc. 11.* for faint pleading of him who has the freehold. *2 Inst. 323.*

(A 2.) Of him in Reversion or Remainder.

So, by the common law, if tenant for life, or years, by collusion, and to the fraud of him in reversion, permitted himself to be impleaded, and would not vouch him, as he might, he in reversion without being vouched might appear and enter into warranty for defence of his right. 2 *Inst.* 344.

And now by the *st. W.* 2. 3. if tenant in dower, by courtesy, for life, or in tail, makes default, the heir, or he in reversion, shall be admitted to answer, if he comes before judgment. 2 *Inst.* 345.

So, if a lease be to *A.* and *B.*, and upon a *præcipe* against *A.* alone, he makes default, he in reversion shall be received. 2 *Inst.* 345.

So, tho' there be a *mesne* estate for life between the tenant who makes default and him in reversion. 2 *Inst.* 346.

So, if the reversion be granted for life to *B.*, who does not pray to be received, the reversioner in fee may. 2 *Inst.* 346.

So, if the tenant surrenders to him in reversion, tho' he has not properly a reversion, he shall be received. 2 *Inst.* 346.

So, he shall be received, where the tenant pleads *nil dicit*, or departs in despite of the court. 2 *Inst.* 346.

So, if the tenant be only of a rent, by equity, the reversioner shall be received. 2 *Inst.* 346.

So, by the *st.* 13 *R.* 2. 17. he in reversion who prays to be received shall find surety of the issues of the lands in demand.

But the king cannot be received; for he cannot be a tenant, or *in loco tenentis*. 2 *Inst.* 346.

Nor, he in reversion after an estate-tail general, or special; for the statute shall be understood of tenant in tail after possibility only, 2 *Inst.* 345. 1 *And.* 133. 4 *Leo.* 51.

So, a reversion ought to be vested in him; for a condition, or possibility, is not sufficient. 2 *Inst.* 345.

So, regularly, a reversioner shall not be received, where no reversion is in him at the time. 2 *Inst.* 346.

So, if the tenant prays in aid of him in reversion, who refuses, he shall not be afterwards received. 2 *Inst.* 345.

(A 3.) Of a Wife upon Default of her Husband.

So, by the *st. W.* 2. 3. if the husband be absent, or will not defend, or will render against the will of his wife, *si uxor venerit ante iudicium parata petenti respondere et jus suum defendere admittatur*.

And therefore, in a real action against husband and wife, if the husband by default, or reddition, loses the estate of the wife, she shall be received. 2 *Inst.* 343.

So, upon a *nient dedire*, or *nil dicit* by the husband. 2 *Inst.* 343.

So, upon faint pleading by the husband. *Cont. per Prifot. R. acc.* 8 *E.* 2. *Cont. per Coke*, 2 *Inst.* 343. (*Acc. Cro. El.* 826.)

So, if the husband makes default at the assizes, tho' judgment is not given upon his default without a trial. *R.* 2 *Leo.* 9.

So, upon a default by the husband to the *petit cape*. 1 *And.* 18.

So, if the husband pleads falsely; as, non-tenure. *R. Cro. El.* 826.

And it is not a good counterplea, that the husband and wife, after default, levied a fine to a stranger. *R.* 1 *And.* 18.

But if the wife be not impleaded with her husband, the wife shall not be received. *R. Mo.* 242. 1 *Leo.* 86. Yet,

Yet, he in remainder, or reversion, may be received and plead joint-tenancy, &c. in abatement. *R. Mo. 242. 1 Leo. 86.*

(B) How the Proceeding shall be upon a Receipt.

(B 1.) If the Wife be received.

IF the wife be received, there need not be a declaration *de novo*, for she was party to the suit before. *R. Cro. El. 826.*

(B 2.) If he in the Reversion.

But where he in reversion, not party to the suit, is received, there shall be a declaration *de novo*. *Cro. El. 826. Cont. per Dyer, the other J. acc. Mo. 29. R. cont. per all the J. for, venit paratus respondere* to the demandant, and therefore he ought to answer immediately without imparlance; for he takes notice of the demand. *Mo. 34.*

(B 3.) How the Party shall plead.

After receipt of a tenant for years, he shall be allowed to plead for the safety of his interest. *2 Inst. 324. Vide Abatement, (I 31.)*

Tenant for years ought to traverse the title of the demandant, or plead in bar to it. *2 Inst. 323, 4.*

(B 4.) Judgment by or against Tenant by Receipt.

Tenant for years cannot be received after judgment. *2 Inst. 323.*

If he be received before judgment, and his plea allowed, judgment shall be only that execution for the demandant be suspended during the term. *2 Inst. 324.*

And tho' there be such judgment, he shall pay his rent, shall be subject to waste, &c. *2 Inst. 323.*

Receipt of Parcel.

Vide Abatement, (H 51.)

Court of Receipt in Exchequer.

Vide Courts, (D 4.)

R E C E I V E R.

Vide Accompt, (A 4. E 5.)

R E C I T A L.

Vide Evidence, (B 5.)—Fait, (E 1.)—Grant, (G 10.)—Parols, (A 19.)—Pleader, (C 9.)

Recital of a Statute.

Vide Action upon Statute (G—H—I.)—Pleader, (2 S 2.)

RECOGNIZANCE.

Vide Bail (O—P).—*Dett*, (A 3.)—*Enfant*, (B 4.)—*Forcible Entry*, (D 20, &c. 26, 27.)—*Justices of Peace*, (B 5, 6, 7, 8.)—*Obligation* (K).—*Parliament*, (L 47.)—*Pleader*, (2 W 10. 34, 35.—3 L 16.)—*Statute Staple* (B).

RECOMPENCE.

Vide Dismes, (E 10. 17.)

R E C O R D.

(A) What is Matter of Record.

A Record is a memorial of a proceeding or act of a court of record, entered in a roll of parchment for the preservation of it. *Co. L. 117. b. 260. a.*

[And a record found in the proper office must be intended to have been always in the plight in which it is found; parol evidence shall not be admitted to prove that it was once wrong, and has since been altered. 1 *Bl. Rep.* 664.]

[A foreign judgment is not a record; and therefore *nul tiel record* is no plea to an action on such a judgment, tho' the plaintiff has called it a record in his declaration, and concluded *prout patet per recordum*. *Doug.* 1. 7.]

[A roll is not a record till it is put in the bundle. *Bolton v. Jeffs*, *H. 5 G. Fort.* 355.]

[An affidavit read and filed becomes a record of the court, and cannot be taken off the file. *Beal v. Lansstaff*, *H. 8 G. 3. 2 Wilk.* 371.]

[If record is lost, the court may order a new entry. *King qui tam v. Bolton*, *H. 5 G. Needham v. Grano*, *P. 9 G. Str.* 141.]

[If writ of inquiry is executed, costs taxed, but final judgment not entered, and it is lost, the court may order new writ of inquiry, and inquisition to be made according to the sheriff's notes, and the costs to be indorsed according to commitment-book. *Bean v. Elton*, *T. 10 G. 2. Str.* 1077. *Andr.* 12.]

[An extent and inquisition being lost, may, on motion, be new engrossed from the sheriff's minutes signed by the jury. *Rex v. Blundel*, in *Sc. M.* 21 G, *Bunb.* 88. *N. B.* Defendant consented, & dissent. *Montague B.*]

[So, a new *possea* may be made from the record above, and the minutes in the associate's book. *Ibid.* *Dayrell v. Bridge*, *H. 20 G. 2. Str.* 1264.]

[After verdict, record of *nisi prius*, and writ of *habeas corpus jurat.* lost, new record and writ may be made out, and verdict returned. *Barnes*, 466.]

[If judgment roll is carried in and docketed, and then lost, a new roll may be filed, on motion, many years afterwards. *Evans v. Thomas*, *P. 2 G. 2. Str.* 833.]

(B) How tried.

A Record is of so high a nature, that it can be tried only by itself.
Co. L. 117. b. Vide Trial (A).

If issue be upon *nul tiel record*, where the record is alleged in the same court, day shall be given for the inspection.

If there was such a record at the time of the plea, the issue shall be for the plaintiff, tho' there be a discontinuance entred upon the record before the day given for producing it. *R. 1 Sal. 329.*

But if *nul tiel record* be pleaded as to a judgment, outlawry, &c. and before the day given for producing the judgment, &c. it is reversed by error; the issue shall be for the defendant; for by the reversal it is annulled *ab initio*. *1 Sal. 329.*

(C) What will be a material Variance.

IF a man pleads *nul tiel record*, and there be a material variance between the record itself, and the record pleaded, it will be a failure of the record; as, if a recognizance be taken before a judge in his chambers, and a *scire facias* is sued upon a recognizance before the justices in court. *R. Mod. Ca. 42. Vide Pleader, (3 B 13.)*

[If in debt on judgment of *Hilary* term, and *nul tiel record* pleaded, it appears to be a judgment of *Easter* term. *Ince v. Hay, T. 9 G. Fort. 353.*]

If the name of any party, his abode, or addition, varies. *1 Rol. 754. l. 5.*

Or, there are more or fewer persons parties. *1 Rol. 753. l. 45.*

If it be for different parcels. *3 Co. 2. a.*

Or, different damages are recovered. *1 Rol. 754. l. 40.*

If in trespass for an assault, *15th May, 9 W. 3.* and detaining for twenty days, the defendant pleads a recovery for the same trespass, against a joint-trespasor, and the record is for an assault *14th May*, and detaining for ten days; where there is not an express averment that they are the same. *R. Lut. 945.*

If a recovery be recited to be upon affirmation by *A., B., and C.*, and the record is by *A. and B. only*. *R. Mo. Ca. 168.*

[If *certiorari* to remove conviction against *A.* and his wife, and the return be of conviction against *A. only*; for this variance the *certiorari* will be quashed. *Anon. M. 5 G. Str. 116.*]

[If judgment is on several promises, and entire damages, and the *scire facias* recites *cujusdam promissionis*, it is variance, and cannot be amended. *Baynes v. Forrest, H. 4 G. 2. Str. 892.*]

[If plaintiff, in action against sheriff, says, that by precept of the king, &c. and on *nul tiel record* it appears to be a bill of *Middlesex*, judgment shall be, *quod perfecit recordum*. *Harris v. Bernard, H. 10 G. 2. Str. 1069.*]

(D) What not.

BUT if a record has not a material variance, it is not a failure of record; as, if in an action upon the case for a conspiracy in indicting of barretry, it be alleged that it was *coram justiciariis de P. necnon ad diversas felonias*, &c. and the indictment was before justices
of

of the peace, without more; for as justices of the peace they may take the indictment. *R. 2 Cro. 32. Yel. 46.*

If to a recognizance pleaded, *nul tiel record* be applied, and thereupon a recognizance with a condition be produced. *Pl. Com. 14. b.*

If to an information, a prior information, 28th April, 14 Jac. for the same cause be pleaded, and upon *nul tiel record* an information, 29th April, without other variance, be produced; for it was prior. *R. Hob. 209.*

In trespass, the defendant justifies by an execution out of an inferior court, where a plaint was, and afterwards, viz. 2 Oct. 34 Car. 2. judgment, &c. *nul tiel record*, the record of the judgment produced was 25th December, 34 Car. 2. yet a good execution. *Dub. 3 Lev. 243.*

If a variance be in the style of the king, as, if *Scotland* be omitted. *3 Mod. 228.*

[If the record has a date in words at length, and *George* now king, and the replication has the date in figures, and also in words at length interlined, and *George* the Second, now king, it is no variance; for the figures and the *Second* shall be rejected as surplusage. *Fisher v. Sowerby, T. 8 G. 2. B. R. H. 131.*]

If the judgment pleaded be *in cur. O. protect. Angliæ & domin. & territor. adinde spectan.*, and in the record produced (*territor.*) is omitted. *R. 3 Mod. 227.*

If a patent be pleaded without mention of a date, and upon *nul tiel record*, a patent be produced with a date. *20 H. 7. 7. a.*

If the record produced varies only in the process, or continuances, (being out of an inferior court,) it is not material. *R. Hob. 179.*

If a fine with proclamations be pleaded, *An. 30 H. 8.* but the record produced has proclamations, *Pas. Mich. & Hil. An. 30 H. 8.* and the proclamations of *Trin.* are entred without mention of the year; for, of necessity, it must be the same year. *R. Dy. 234.*

[On *nul tiel record*, *Segrave* for *Seagrave*, no variance, *quia idem sonnat.* *Williams v. Ogle, H. 4 G. 2. Str. 889.*

[Declaration for damages only, record for damages and costs, is not material. *Barnes, 274.*]

(E) No Averment against a Record.

A Record is of so high a nature, that no averment can be taken against the record. *Co. L. 260. a.*

So, tho' the matter be only supposed by the record; as, if a fine be of land in *A.* and *B.*, it cannot be averred that there is no such vill as *A.* *1 Leo. 82.*

(F) A Record cannot be varied.

SO, regularly, a thing entred upon record, cannot be varied.

So, in the same term, an act of the party, entred upon record, shall not be varied; as, a nonsuit or default. *Sal. 567.*

A default of the defendant in ejectment to confess lease, entry, and ouster; tho' the plaintiff consents. *R. Sal. 566.*

But the act of the court may be varied in the same term. *Sal. 567.*

(G) Record removed from one Court to another.

HOW a record shall be removed for error, *vide Pleader*, (3 B 13.)
How by *certiorari*, *vide Certiorari*, (A 1, &c.)

A record removed out of another court into B. R. can never be remanded after it is filed, in the same or in another term. R. 1 Sal. 352.

Vide more concerning Record in Amendment (K 1, 2.—N).—*Enquest*, (A 2, 3.)—*Estoppel*, (A 1.—E 1, &c.)—*Evidence*, (A 1, &c.)—*Forfeiture*, (A 2.)—*Imprisonment*, (H 1.)—*Pleader*, (E 18.—F 20.—G 6.—P 2.—S 14. 16.—3 B 13.)—*Prerogative*, (D 66.)—*Return*, (E 4.)—*Sewers* (D).—*Trial* (A).

Nul tiel Record.

Vide Pleader, (2 W 13.)

R E C O R D A R E.

Vide Ancient Demesne, (G 5.)—*Droit*, (B 6.)—*Pleader*, (3 K 8.)

R E C O R D E R.

Vide Franchises, (F 24.)

Recorder of London.

Vide Certificate (B).—*London* (E).

R E C O V E R Y.

(A) Recovery.

A Recovery is when a man obtains or recovers his right in lands or goods, &c. by judgment or trial at law. Co. L. 154. a.

And every recovery is feigned (which is usually called a common recovery) or real.

[Common recoveries are now a mere form of conveyance, allowed (under certain circumstances of form and ceremony) to tenants in tail in possession, generally; and to tenants in tail in remainder, with consent of the owner of the first estate for life. *Taylor v. Horde*, H. 30 G. 2. 1 B. M. 60.]

[And therefore are expounded more liberally than adverse suits. *Cowp.* 346.]

(B) Common Recovery.

(B 1.) By whom it may be suffered.

A Common recovery may be suffered by him, who has an estate in fee.

Or, by him who has an estate-tail in possession.

[And

[And if a man devise to his daughter an express estate-tail, but afterwards say such devise shall be void as to inheritance of heirs; if she die without children, and the estate shall descend to his heir male, a recovery suffered by the daughter is good, tho' she afterwards die without issue. *Coup.* 379.]

So, the tenant for life, and remainder-man in tail, may join to suffer a common recovery. *R.* 10 *Co.* 44, 45. *Cro. El.* 570. *Mo.* 690. *Vide Estates*, (B 27.)

[If *A.*, tenant for years, with remainder to *B.* for life, remainder to the first and other sons of *B.* in tail, remainder to *B.* himself in tail, join with *B.* in a lease and release to make a tenant to the *præcipe*, and suffer a recovery; the estate-tail limited to the sons of *B.* is not divested by the recovery; only the remainder to *B.* in tail, subsequent to the remainder in tail to his first and other sons, is barred. 1 *Term Rep.* 738.]

So, husband and wife, seised in right of the wife, may suffer a recovery of the inheritance of the wife. 2 *Rol.* 395. *l.* 44. *Vide Baron and Feme*, (G 2.)

[If *A.* devise lands to *B.* and his heirs, to the use of *B.* and his heirs, in trust for *C.* and the heirs of her body, remainder to *B.* in fee, on condition that he marry *C.* which he offers to do, and she refuses and marries another, and at full age suffers a recovery with her husband, this bars the remainder, tho' without a fine. *C. T. T.* 164.]

So, they may join a recovery, where they are jointly seised of an estate, before or after marriage. *Vide Baron and Feme*, (G 2.)

So, a recovery by the husband alone, as vouchee, will be good against all but the wife, where they are jointly seised for life, remainder to the husband in tail. *Ibid.*

So, if they were tenants in special tail, remainder to the husband in tail, remainder over, it will be a bar to all remainders.

So, a recovery upon a *præcipe* against the husband alone, where they were joint-tenants for life, before the coverture remainder to the husband in tail, will be good for a moiety. *R.* *Mo.* 95.

So, a recovery by an infant, as vouchee, by his guardian, will be good. *Vide Infant*, (B 2.)

So, if he appears by attorney, or in person, it shall be good, till it be defeated by error. *Vide Infant*, (B 2.)

[By *§.* 14 *G.* 2. *c.* 20. *§.* 4. purchaser for valuable consideration, after twenty years, producing the deed to make tenant to the writ, and declaring the uses; such deed shall be evidence that the recovery was duly suffered, provided the person making the deed had sufficient estate and power.]

(B 2.) By whom not.

But a recovery suffered by tenant for life, is not good; for by the *§.* 32 *H.* 8. 31. and 14 *El.* 8. it will be a forfeiture, for which he in remainder may enter, after or before execution. *R.* 1 *Co.* 15.

Tho' he conveys to another in fee, who suffers a common recovery, in which the tenant for life, is vouchee. *R.* 1 *Co.* 15. *Mo.* 271.

[*A.* is tenant for life with remainder in fee to his heirs male or female, if he had any; and if he had none, then a remainder over; and

and suffers a recovery, whereby all the remainders, being contingent, were barred. *Webb v. Puckey*, B. R. T. 33 Geo. 3. 5 T. R. 299. *Lodding v. Kime*, C. P. E. 9 W. 3. 1 Ld. Raym. 203.]

So, if there be tenant for life, remainder to *B.* in tail, a recovery by *B.* is void, and does not bind his issue by *estoppel*. R. Mo. 256.

So, if *A.*, tenant in tail, enfeoffs *B.*, who re-enfeoffs *A.*, *C.*, and *D.*, for the life of *A.*, remainder to *F.* in fee, and a recovery is had against *A.*, and after his death *C.* and *D.* enter; this recovery binds the feoffees *C.* and *D.* only during the life of *A.* R. 1 And. 44.

So, a common recovery by him, who is not seised in privity of the estate-tail, does not bar the entail or remainders. 2 Rol. 394. l. 40.

As, if tenant for life, remainder to *B.* in tail, be disseised, and the disseisor enfeoffs *B.* who suffers a recovery, it does not bar the entail; for *B.* was not seised of it, and the recompence does not extend to it. R. 3 Co. 59. 2 Rol. 395. l. 5.

So, a recovery by tenant in tail, after an attainder for treason, does not bar the remainders. 2 Rol. 394. l. 37.

So, if an eldest son, inheritable to the entail, enfeoffs *A.* against whom a *præcipe* is had with a voucher of the son, who afterwards dies without issue, in the life of tenant in tail; the recovery does not bar the younger son of the tenant in tail. R. 1 And. 44.

So, a common recovery by husband alone, seised in right of his wife, does not bar her estate. 2 Rol. 394. l. 10.

So, a recovery by an infant does not bar him. 2 Rol. 395. l. 45. *Vide ante*, (B 1.)

[A recovery ought not to be supported where the parties had no power to suffer it; and *stat. 14 G. 2. c. 20.* proceeds upon their having power to suffer it. *Taylor v. Horde*, H. 30 G. 2. 1 B. M. 60.]

[A secret feoffment under a naked possession is not sufficient to support a common recovery suffered by the remainder-man. *Ibid.*]

[Those who have no power to suffer a recovery, shall not, by making an estate by *wrong*, or *fraud*, or *præcipe*, bar those in remainder or reversion; and such estate is no estate in law. *Ibid.*]

[A recovery, which the parties had no power to suffer directly, and without such fraudulent estate, shall not be made good by wrong and fraud. *Ibid.*]

[A feoffee to the intent to be tenant to the *præcipe* is a mere instrument for one purpose of form only; and a man, by his own injurious feoffment, shall not acquire an advantage to himself; an act founded on wrong shall not, by virtue of the crime itself, become legal, for the author's advantage. *Ibid.*]

[If *A.*, tenant in tail-remainder, after the death of *B.* jointress, tenant for life in possession, recovers in ejectment against her, and enters, and has possession, but *B.* is not ousted, nor *A.* seised, and *A.* enfeoffs *C.* to make him tenant to the *præcipe*, and a recovery is thereupon suffered, it is void; for *A.* is not a disseisor, nor is his feoffment a disseisin. *Ibid. Vide Cowp. 702.*]

(B 3.) Who shall be a good Tenant to the *Præcipe*.

In every common recovery there ought to be a good tenant to the *præcipe*; and therefore, if the tenant had not the freehold at the time of the recovery, it will be error. [*Hale v. Wigg*, B. R. T. 36 Geo. 3. 6 T. R. 708.] [Limitation

[Limitation to *A.* for ninety-nine years, if he so long live, "and from and after the death of *A.* or other sooner determination of the estate limited to *A.* for ninety-nine years, then to trustees during the life of *A.* to preserve contingent remainders, and after the end or other sooner determination of the said term, then to the first son of the body of *A.* in tail male," with divers remainders over: *A.* together with his son *B.* levied a fine and suffered a recovery, and both died: it was holden, that the limitation to *B.* was a good limitation; that the limitation to the trustees was a vested remainder; that the freehold was in them at the time of levying the fine, consequently that the fine did not make a good tenant to the *præcipe*, and that the recovery did not bar either the remainder to *B.* or the subsequent remainders. *Parkhurst v. Smith*, *Dom. Proc. H.* 15 *Geo. 2. Wils.* 327. 4 *Bro. P. C.* 405. 3 *Atk.* 135. *S. C.*]

As, if *A.* be tenant for life, remainder to *B.* in tail, and the *præcipe* be against *B.* 1 *Vent.* 360. 3 *Co. 6. b.*

Or, against *A.* and *B.*, for *B.* has nothing in the freehold. *Dy.* 252. *b.* 3 *Co. 6. b.*

So, if by fine an estate be given to husband and wife for their lives, and the *præcipe* be against the husband alone; for they take by entirety, and the husband alone has nothing. *R.* 3 *Co. 5. a. Mo.* 210. 1 *And.* 162. *R. Sal.* 568.

So, if the husband alone, by lease and release, conveys to *B.*, and a *præcipe* be against *B.*; for the husband cannot dispose of any part of the land. *Semb.* 3 *Co. 5. a.*

But it will be good, if he had the freehold at the time of the recovery, tho' it was upon a defeasible title; as, by feoffment, as well as by fine of tenant in tail, tho' this was a discontinuance.

By bargain and sale of the tenant in tail.

[Tho' the bargain and sale was not inrolled till the recovery completed. *C. T. T.* 164.]

Or, lease and release.

Tho' the bargainee was made tenant to the *præcipe* before inrolment, if the deed be afterwards inrolled. 1 *Vent.* 360. *Cont. per Hob. Godb.* 218. but this seems misreported. 2 *Rol.* 394. *l.* 40.

If he be made tenant of the freehold by the uses declared of a fine, which is afterwards reversed. *R. Sal.* 568.

If tenant for life surrenders to him in reversion, or remainder, upon condition, and afterwards a *præcipe* is brought against him in reversion or remainder; tho' immediately after the recovery, the tenant for life re-enters for the condition broken. *Semb. Skin.* 3. 63.

If tenant in tail levies a fine to *A.* and his heirs, to the intent to make him tenant to the *præcipe*, and seven years afterwards a *præcipe* is brought against *A.* who vouches the tenant in tail; he shall be a good tenant, tho' no use be declared to him by writing, since the 4. 29 *Car. 2. 3. R. Eq. R.* 17.

So, if tenant in tail, and a stranger who has nothing, are tenants to the *præcipe*, it will be good. 1 *Vent.* 358. *R. Pl. Com.* 514. *Skin.* 3.

So, if tenant for life surrenders to *B.* in reversion (who is made tenant to the *præcipe*) at any time before the recovery suffered; tho' the judgment relates to the first day of the term. *Per two J. Noy*, 126.

So,

So, if a *præcipe* be against *A.* returnable 15th *Mart.*, and *A.* then appears and vouches *B.* tenant in tail, against whom a summons *qd warrantizandum* goes, returnable *Oct. Pur.*, and *B.* by lease and release, 1st and 2d *Jan.* before conveys to *A.* for life; it is sufficient to make him a good tenant to the *præcipe*, tho' he was not so at his appearance or voucher. *R. & Aff. in Error, Sal. 569. Comb. 425.*

So, it is sufficient if he be a good tenant at any time before the recovery had, viz. the judgment. *Sal. 569. Sho. 347.*

[By *stat. 14 Geo. 2. c. 20.* common recovery of premises in lease for lives are valid, without surrender of such leases, or the tenant's joining to make a tenant to the writ.]

[§. 2. But not unless the person entitled to the first estate for life, or greater estate after the expiration of such lease, shall convey an estate for life at least to the tenant of the writ.]

[§. 3. And this shall not prejudice the estate of the lessee.]

[§. 5. After twenty years it shall be good, tho' the deed to make the tenant do not appear.]

[§. 6. Recovery shall be good, tho' the fine or deed, making the tenant, should be levied or executed after judgment in the recovery, and the writ of seisin awarded, provided it is in the same term.]

[Where the deeds to make a tenant to the *præcipe* were not executed until after the execution of the writ of seisin; still the recovery was holden good, because the deeds were executed in the same term in which the recovery was suffered. *Goodright v. Rigby, C. P. T. 32 Geo. 3. 2 H. Bl. 46. B. R. E. 33 Geo. 3. 5 T. R. 177.*]

[If tenant in tail in remainder suffer a recovery, it shall be presumed, after a long time, (as forty years,) that tenant for life in possession surrendered. *Warren v. Greenville, P. 13 G. 2. Str. 1129.*]

[But here was also an entry in the attorney's debt-book, he being then dead, of drawing and engrossing surrender from tenant for life, mother to the tenant in tail; and the bill was paid. *Vide Goodtitle v. Duke of Chandos, M. 1 G. 3. 2 B. M. 1065.*]

[On an old recovery, where no deed appears, a proper tenant to the *præcipe* shall be presumed; but if a deed appears wherein proper parties did not join, and the uses are declared to be warranted by such deed, the court will not presume there is any other. *Keen v. Earl of Effingham, P. 20 G. 2. Str. 1267.*]

[When one has power to suffer a recovery, it shall be presumed all is rightly done, unless something appears to the contrary. *Ibid.*]

[But there can be no presumption, where there is no ground for it. *Ibid.*]

[The supposition that tenant in tail would not suffer a recovery, without getting a surrender of life-estate, forms no presumption. *Ibid.*]

[A long possession by tenant in tail, after death of tenant for life, doth leave ground of presumption. *Ibid.*]

(B 4.) What the Effect will be, if there be not a good Tenant.

If there be not a tenant of the freehold tenant to the *præcipe*, the recovery will be void.

And therefore, if a recovery be pleaded in bar, the plaintiff may say, that the party named tenant *non tenuit*. *Jon. 352, 3.* But

But if it be found that the person named tenant was tenant for part, the recovery will be good for so much, tho' void for the residue. *R. Jon.* 353. 374.

(B 5.) The Effect of a Recovery.

How a recovery by judgment, &c. shall be executed, *vide Execution*, (A 2. 6.)—*Fine*, (E 15.)

A judgment *semper pro veritate accipitur*. *Co. L.* 39. a.

And therefore, by the common law, a party, or privy to the judgment, can never falsify the same recovery.

So, the issue in tail cannot falsify a recovery against tenant in tail, after a verdict, in the point tried. *Co. L.* 361. a.

Nor, a wife after the death of her husband, upon a recovery against the husband. 2 *Inst.* 350.

So, he in remainder or reversion, or any, who derive an interest under him, cannot falsify a common recovery by tenant in tail. 1 *Co.* 62. b.

So, if there was a term for years, and afterwards a recovery against the tenant of the freehold, the termor, by the common law, could not falsify the recovery, tho' it was by collusion. *Co. L.* 46. a. 2 *Inst.* 322.

[If tenant in tail mortgage for years, and suffer a recovery afterwards, that shall let in the mortgage, and all other incumbrances made by himself. 1 *Wils.* 276.]

(B 6.) When it may be falsified.

(B 6.) *By the issue in tail.*] But if a recovery be against tenant in tail by default, the issue in tail may falsify it, if it was upon a false title; as, if A. recovers against tenant in tail, in a writ of entry upon a *disseisin* alleged by him of the grandfather of A., and after default execution is sued; the issue in tail may have a *formedon*, and if the recovery be pleaded, may say, that tenant in tail did not disseise the grandfather of A. *Lit. f.* 688.

So, if a recovery be against tenant in tail by *nil dicit*, confession, or demurrer. *Co. L.* 361. a.

So, if a recovery be against tenant in tail by verdict, tho' the issue in tail cannot falsify it in the point tried, he may falsify it by collateral matter; as, by a collateral warranty, or a release, not pleaded by the tenant in tail. *Ibid.*

So, the issue in tail may avoid a recovery, by confession and avoidance of the point tried. *Ibid.*

(B 7.) *By him in reversion or remainder.*] So, if a recovery be against tenant for life, which makes a discontinuance of the reversion or remainder, it may be avoided by entry. *Co. L.* 362. a.

If the recovery was by covin, or consent, by the *st.* 32 H. 8. 31. and 14 El. 8. it will be a forfeiture, and he in reversion or remainder may enter for the forfeiture. *Co. L.* 362. a. *Vide Forfeiture*, (A 2.)

(B 8.) *By a term or for years.*] So, by the *st.* Glo. 11. if a recovery be by default in London against the tenant of the freehold, he, who has a term for years, being ousted, the mayor and bailiffs may inquire,

quire, whether the recovery was by collusion, and if so found, the execution shall be suspended till the term is passed; so by equity, before justices, if the termor challenges before judgment.

And therefore, before judgment, the termor by deed may claim to be received to defend his right. 2 *Inst.* 323. *Vide Receipt*, (A 1.)

And after judgment, he who has a term by deed, if the judgment was by default, shall have a writ of inquiry upon that statute, to inquire, whether the judgment was by collusion? and if it be so found, the judgment shall be suspended, till the term is passed. 2 *Inst.* 321.

And this upon a recovery in other courts, cities, or boroughs, as well as in *London*. 2 *Inst.* 322.

So, now, by the *st.* 21 *H.* 8. 15. a termor for years, by deed, or without writing, may falsify for his term only, a recovery by feigned and untrue title; and shall enjoy his term according to his lease, against such recoveror, his heirs and assigns. And so may tenant by statute-merchant, staple, or *elegit*. *Vide Co. L.* 46. a. 2 *Inst.* 322.

And this tho' the demise for years be not by writing. 2 *Inst.* 322.

So, if there be a recovery in dower by a woman, against lessee for years, as tenant of the freehold; he may enter upon the demandant for his term, tho' he has not pleaded *non-tenure*. *Per two J.* 1 *Leo.* 92.

(B 9.) *How the proceeding shall be.*] The proceeding to falsify such recovery against him who has the freehold, shall be by writ, in the nature of a commission to the mayor and bailiffs, reciting the lease, the action brought by collusion, and the *st.* of *Gloc.* and afterwards commanding them to do right. 2 *Inst.* 323.

Vide more concerning a Real Recovery in Action, (K 1, &c.)—*Estates*, (B 26.)—*Pleader*, (3 M 14.) Concerning a *Common Recovery* in *Baron and Feme*, (G 2.)—*Chancery*, (3 N 1, 2.—4 K 1, 2.)—*Infant*, (B 2.)—*Estates*, (B 27, &c.)—*Pleader*, (2 Y 14.—3 A 2, &c.)

RECTOR.

Vide Dismes, (C 1.)—*Ecclesiastical Persons*, (C 6.)

RECTORY.

Vide Ecclesiastical Persons, (C 6.)

RECUSANT.

Vide Justices of Peace, (B 17, 18, 19.)

REDEMPTION.

Vide Chancery, (4 A 4, &c.)

RE-DISSEISIN.

Vide Assise (F).

RE-ENTRY.

Vide Rent, (D 3, &c.)

RE-EXTENT.

Vide Statute-Staple, (D 7, 8.)

R E E V E.

Vide Leet, (M 3.)

REFERENCE.

Reference to a Master.

Vide Chancery, (W 1, &c.)

REFUSAL.

Refusal of Tender.

Vide Condition, (L 4.)

REGARDER.

Vide Chase, (Q 3.)

REGISTER.

Registers of Chancery.

Vide Chancery, (B 6.)

REGISTERING ESTATES.

Vide Popery, (B. 10. 12.)

REGRATING.

Vide Justices of Peace, (B 39.)

REGULATION OF TRADE.

Vide Trade (B).

REHEARING.

Vide Chancery, (Y 5.)

REJOINDER.

Vide Chancery (O).—Pleader (H).

RELATION.

Vide Bargain and Sale, (B 9.)—Chancery, (3 Y 16, 17.)—Confirmation, (D 5.)—Dett, (G 9.)—Execution, (D 1, 2.)—Forfeiture, (B 6.)—Parliament, (R 1.)

RELEASE.

(A) Release.

(A 1.) Express.

(A 1.) *By what words it shall be.* A Release is, when a man quits or renounces that which he before had.

And it may be by express words, or by act in law. *Co. L. 264. b.*

A release by express words does not require any particular word; for if a man remises, or quits claim, it will be of the same effect as the word, *release*. *Lit. f. 445.*

So, if he renounces, acquits, &c. *Co. L. 264. b.*

If a joint-tenant grants, bargains, and sells his land to his companion; this amounts to a release. *R. 1 Vent. 78. 2 Sand. 96. 1 Sid. 452. Ray. 187. 1. Ld. Raym. 420. 690.*

So, if a lessor grants, that his lessee shall be discharged of his rent; this amounts to a release. *Co. L. 264. b.*

So, if a man acknowledges himself to be satisfied and discharged of all bonds, &c. by the obligor; this amounts to a release of a bond, *R. 9 Co. 52. b.*

So, if a man covenants that he will never sue for a debt; this amounts to a release. *Cro. El. 352. 1 Rol. 939. l. 50. Per Holt, Sho. 47.*

So, if he covenants, that he shall not be sued within such a time, and if he be, that it shall be a release; this amounts to a release. *21 H. 7. 24. 1 Rol. 939. l. 50.*

But, if a man by deed grants, that the obligor shall not be sued before such a feast; this does not amount to a release; but is only a covenant. *R. 21 H. 7. 24. a. R. Cro. El. 352. 1 Rol. 939. l. 45. R. T. R. 1 W. & M. B. R. inter Ayliffe and Schrimshire, Sho. 47.*

Or, covenants that he will not sue in such a time upon pain of forfeiture of his debt. *Semb. Sho. 331.*

So, a release by express words can only be by deed. *Co. L. 264. b.*

(A 2.) Release in Law.

So, a release may be by act, or operation of law; as, if a lord disseises his tenant, and makes a feoffment, by deed, or without deed; this amounts to a release of his seigniory. *Co. L. 264. b.*

If a disseisee disseises the heir of the disseisor, and makes a feoffment; this amounts to a release of his right. *Ibid.*

So, if a man makes his debtor, by bond or otherwise, his executor; this amounts to a release of the debt; for he cannot have an action against himself, and a personal thing suspended is lost. *Co. L. 264. b. Vide Administration, (B 5.)*

So, if there are joint-debtors, and he makes one of them his executor, or the wife of one of his executrix. *Ibid.*

So, if a woman obligee, or one of the obligees, takes to husband the debtor; it will be a release of the debt. *Co. L. 264. b.*

But an act does not amount to a release in law, to the prejudice of another; as, if an executrix takes to husband the debtor of her testator. *Co. L. 264. Vide Administration, (B 5.)*

Or, the ordinary grants administration to him. *Vide Administration*, (B. 5.)

So, where a man makes his debtor executor, &c. his debt shall be assets in his hands for the testator's creditors. *Vide Administration*, (B. 5.)

So, a release in law shall not be extended beyond the evident intent; as, if a disseisee disseises the heir of the disseisor, and makes a lease for life; this does not amount to a release of his right, but only for the life of the lessee. *Co. L. 264. b.*

(A 3.) When Words enure to a double Intent.

If a woman *mesne* takes to husband the tenant *per avoile*, and the lord releases his right to the husband; this enures to extinguish the feigniory, and also the *mesnalty*. *Co. L. 280. a.*

So, if a tenancy be granted to the lord and *B.* and the heirs of *B.*, and the lord releases to *B.*; this enures to pass his estate in the tenancy to *B.*, and also to extinguish his feigniory. *Co. L. 280. a.*

So, a lord grants his feigniory to *B.* for years, and afterwards releases to him and the terre-tenant, generally; the feigniory, and also the estate of *B.*, shall be both extinguished. *Co. L. 280. a.*

(B) Releases; how they enure. Release of a Right.

(B 1.) What shall be a good one.

RELASES are of a right, or of an estate in lands and tenements, or of things personal.

If a man, who has but a naked right to land, releases all his right to him who has the freehold of the same land; it will be a good release of his right. *Lit. f. 447. 10 Co. 48.*

As, if a disseisee or his heir release to the disseisor or his heir.

So, if he releases to him who has but a freehold in law, and not in deed; as, if he releases to the heir of the disseisor before his entry. *Lit. f. 448.*

So, if he releases to him who has the reversion or remainder in deed of the same land, tho' he has not the freehold; as, if disseisor makes a lease for life only, and afterwards the disseisee, or his heir, releases to the disseisor, who has the reversion in him. *Lit. f. 449.*

So, if a disseisor releases to *A.* for life, remainder to another, and the disseisee releases to him in remainder. *Lit. f. 450.*

So, if he, who has an annuity by prescription out of a rectory, releases to the patron in time of vacation. *Col. L. 266. a.*

So, if he releases to him, who has an estate only by *estoppel*, or in supposition of law; as, if the demandant releases to the tenant in a *præcipe*, it will be good, tho' he has aliened before, *pendente lite*. *Co. L. 266. a.*

Or, to the vouchee, tho' he has nothing in the land; for he is tenant to the demandant in supposition of law. *Co. L. 265. b.*

So, a release of a right may be good, in respect of privity, to him who has not any estate; as, if a tenant be disseised, and the lord releases all his right to the disseisee; his feigniory is extinct. *Lit. f. 454.*

So,

So, if a donee, rendring rent, be disseised, and the donor releases to him his right; this extinguishes his rent in respect of the privy. *Lit. f. 455.*

Or, if the donee, rendring rent, discontinues in fee, and afterwards the donor releases to him. *Co. L. 269. a.*

So, if a lessee for life, rendring rent, be disseised, and the lessor releases to him all his right; the rent is extinct, tho' the reversion is not. *Lit. f. 456.*

So, if the lessor releases to the lessee for years, before his entry or term commenced, all his right in the land; the rent is extinguished. *Co. L. 270. a. Vide post. (C 2.)—Estates, (G 14.)*

So, a release of a right will be good, tho' there be no privy between the releasor and releasee; as, if the disseisor makes a lease for life, and the disseisee releases his right to the lessee. *Co. L. 266. a.*

Or, to *A.* and his heirs for the life of another, and the disseisee releases to the heir. *Co. L. 275. a.*

Tho' the release be to the heir before his entry. *Ibid.*

So, a release of a right will be effectual, tho' there be no mention of the heirs of the releasee: as, if a disseisee releases to the disseisor, generally. *Lit. f. 467.*

Or, only for a day, or an hour. *Ibid.*

So, a release of a right upon condition will be good, and upon the condition broken, the right shall be vested. *Co. L. 266. a. 274. b.*

So, a man who has a right only to a chattel, may release to him who has but a chattel, and not a freehold; as, if lessee for years, reversion to *B.*, be ousted, and the disseisor leases to *A.* for years; a release by the first lessee of his right to *A.* is good. *Co. L. 265. b.*

[Tho' a deed be in the form of a release, if there be sufficient words, it may operate as a grant, in order to make it good. *Cowp. 599.*]

Where a release was void as a common law conveyance; it being to convey a freehold to commence *in futuro*; the court were of opinion that it should have the effect and operation of a covenant to stand seised to uses. *Roe v. Travener, C. P. T. 30 & 31 Geo. 2. 2 Wils. 75.*

(B 2.) What not.

But a release by him who has a right to the inheritance or freehold, to him who has not a freehold in deed, or in law, nor an estate in reversion, or remainder, and if there be no privy between them, is void; as, if a disseisee release his right to a lessee for years of the disseisor. *Co. L. 266. a.*

So, if tenant for life, reversion or remainder to *B.*, be disseised, a release by any one of his right to *B.* is void; for he had only a right to the reversion or remainder. *Lit. f. 451.*

So, a release to a disseisee by him who has a rent-charge out of the land, is void. *Co. Lit. 268. a.*

Or, by a donor of his reversion or right therein to the donee, being disseised. *Co. L. 268. b.*

Yet tenant in dower may release her dower to a guardian in chivalry, tho' he has only a chattel; for it is recoverable against him. *Co. L. 266. a.*

So, a release to him who has no estate or right, is void, tho'

there be a privity between them; as, if tenant in fee makes a feoffment, and afterwards the lord releases to the feoffor, his seignior is not extinct. *Lit. f.* 457.

(B 3.) What Right shall be released.

If a man releases all his right in land, this extends to all his present right. *Co. L.* 265. *a.*

So, it extends to a power of revocation, or other interest of the releasor himself. *Co. L.* 265. *b.*

Tho' he has a present right, only to a future interest; as, if a man has a right only to a reversion or remainder after an estate for life, or years, *in esse.* *Co. L.* 265. *a.*

Tho' he has only a possibility upon a condition broken, or a contingency. *R.* *Jon.* 17.

If a husband leases for life, and dies, and the wife releases her dower, or her right in the land, or all demands, to him in reversion, it will be good; for she has a present right to her dower, tho' she has no right to demand it against him in reversion during the life of the lessee. *Co. L.* 265. *a.* *R.* 8 *Co.* 151. 154. *a.*

If the conusor of a fine of lands in *antient demesne* releases to the conusee his right in the land; this destroys his right to be restored, if the fine be annulled by a writ of disceit, tho' it was a contingency. *F. N. B.* 98. *A.* *R.* 10 *Co.* 50. *a.*

If a conusor of a statute, &c. enfeoffs, and before execution the conusee releases all his right to the feoffee, he cannot afterwards extend upon the feoffee. *R.* *Cro. L.* 40. *Adm.* 2 *Cro.* 439.

But a release of his right does not amount to an extinguishment of a bare authority; as, if a man devises to his executor an authority to sell land, and he releases all his right and title in the land to the heir; this does not extinguish his authority. *Co. L.* 265. *b.*

So, if the executor disseises the heir, and aliens the land. *1 Co.* 111. *a.*

So, if *cestuy que use* before the *ss.* 27 *H.* 8. had devised that his feoffees should sell his land, and they make a feoffment; yet their authority to sell remains. *Co. L.* 265. *b.*

So, a release does not extend to a future right; as, if a father be disseised, and his son (in his lifetime) releases all his right to the disseisor, without warranty, and the father dies; the son is not barred by this release. *Co. L.* 265. *a.*

Tho' the release be of all his right, *quod in posterum quovis modo habere poterit.* *Lit. f.* 446.

So, if tenant for life, remainder to the right heirs of *B.*, be disseised, and the eldest son of *B.* releases; it will be void. *10 Co.* 51. *a.*

So, if the conusee releases, to the conusor of a statute, all his right to the land, he may afterwards extend it. *Co. L.* 265. *b.*

So, if the plaintiff, before judgment against the principal, releases all demands to the bail; this is not a discharge to the bail, if he afterwards obtains judgment and takes execution against the bail. *Co. L.* 265. *b.*

So, if an annuity, &c. be granted upon a condition precedent; a release by the grantee, before the condition performed, will be void. *D.* 1 *Co.* 111. *b.*

(B 4.)

(B. 4.) How the Release of a Right enures.

(B 4.) [*When a release to one enures to another.*] If a disseisor makes a feoffment to two, a release to one enures to both. *Lit. f. 472.*

If tenant for life or in tail be disseised by two, and releases to one, it enures to both; for the disseisors have a fee, and the release of a lessee or donee cannot enure to the whole estate, neither can it enure as an entry and grant, for that shall vest the reversion; and therefore it must enure to both. *Co. L. 276.*

If two joint-tenants are disseised by two, and one of them releases to one of the disseisors, this enures to both; because the release is only of a moiety, and no part in certain. *Ibid.*

If there be two disseisors, and they lease for life, or years, and then the disseisee releases to one of them, it enures to both; for one cannot have the sole possession. *Ibid.*

So, in all cases where a release is to one, who is not merely a wrong-doer, it enures to his companion; as if two usurp to an advowson, and the rightful patron releases to one of them, this enures to both; for their clerk was admitted and instituted, which are judicial acts, and so the usurpation is not merely tortious. *Ibid.*

So, if a disseisin be by two women, and one of them takes husband, a release to the husband enures to both; for he was not a wrong-doer. *Ibid.*

So, if a disseisin be by two, and he who had title to enter for a condition broken, consent to a ravisher, alienation in mortmain, &c. releases to one of them; this enures to both; for the wrong was not immediate to the releasor, and the release was only of a title, and not of a right. *Ibid.*

So, if a disseisee releases his right to the tenant for life; this enures to the benefit of him in reversion or remainder. *Lit. f. 453. 470, 471.*

Or, to the donee in tail. *Co. L. 267. b.*

Tho' the entry of the releasor was not *congeable* at the time of the release. *Col. L. 279. b.*

So, a release to him in reversion and remainder enures to the benefit of the tenant for life, if he can shew it. *Lit. f. 452.*

And to a reversioner after an estate-tail, enures to the tenant in tail. *Co. L. 267. b.*

So, if the lord releases to the feoffee of the tenant, the feoffor shall take advantage of it. *Co. L. 269. b.*

So, if a lessee for life, tenant in dower, or by curtesy, commits waste, and afterwards grants over his estate, and the lessor releases to the grantee; this enures to the benefit of the lessee, &c. *Ibid.*

If a disseisor be disseised by B., a release by the disseisee to B. or any subsequent disseisor, enures to the benefit of all precedent disseisors, when the entry of the disseisee at the time of the release was not lawful. *Co. L. 277. a.*

So, if A. leases for life to one, who is disseised by B. who is disseised by C., and afterwards A. releases his right to C., B. may enter upon him, because the entry of A. at the time of his release was not lawful. *Ibid.*

And if the lessee for life enters, he reverts the reversion in B. *Ibid.*

(B 5.) *Enures by way of passing a right.*] A release of a right usually

usually, enures to pass and vest the right of him who makes the release, in him to whom the release is made; as, if a disseisee releases his right to the disseisor; his estate which was wrongful is now lawful. *Lit. f. 466.*

If the *disseisin* was by two, and he releases to one of them, he shall hold his companion out of the land. *Lit. f. 472.* for it enures as an entry and feoffment. *Co. L. 276. a.*

If a disseisor be disseised, a release to any subsequent disseisor bars all the precedent. *Lit. f. 473.*

So, if a tenant for life, or donee in tail, be disseised by one, and releases his right to him; this vests the right in him during the life of the releasor. *Co. L. 276. a.*

But if the *disseisin* be by two, it enures to both. *Vide ante, (B 4.)*

So, if the king's lessee for life be disseised by two, and release to one of them, he shall hold the other out; for the *disseisin* was only of an estate for life. *Co. L. 276. a.*

So, if joint-tenants lease for life, and afterwards disseise the tenant, and he releases to one of them; he shall hold out his companion. *Ibid.*

So, if lessee for life, and he in reversion, being disseised by two, join in a release to one of them; it enures to him only. *Ibid.*

So, a release by a disseisee to a disseisor of a feoffee of a disseisor, gives him the right, and ousts all *mesne* titles against the releasee since the first *disseisin*. *Co. L. 276. b.*

So, if a disseisor leases for life to *B.* who aliens in fee, a release by the disseisee to him prevents the entry of the disseisor for the forfeiture. *Co. L. 276. b. 277. b.*

So, if he aliens in fee to two, and the release be to one of them. *Co. L. 277. a.*

If the release be to an abator, &c. upon the heir of the disseisor. *Lit. f. 475.*

So, the release of a right defeats all *mesne* charges not granted by the releasee himself. *Co. L. 277, 8.*

But the release of a right does not defeat a *mesne* title, which the releasee himself has granted, or accepted; as, if a disseisor grants a rent-charge, or makes a feoffment upon condition, a release by the disseisee does not defeat the rent or condition. *Lit. f. 476, 477.*

So, if a right be released to him who has possession upon a defeasible title, if the possession be defeated, the right accompanies it; for it was vested in him to whom the release was made; as, if *A.* disseises the heir of a disseisor, and afterwards the first disseisee releases to *A.* against whom the heir of the disseisor recovers; he shall have the right as well as the possession. *Co. L. 266. a. 279. a.*

So, if the disseisee enters upon the heir of the disseisor, when his entry was tolled, and enfeoffs *A.* against whom the heir recovers; he shall have the right also. *Co. L. 266. a. 279. a.*

So, if a donee discontinues in fee, and the donor releases his right to the discontinuée, against whom the issue in tail recovers, the reversion remains in the discontinuée; for the whole right of the fee was vested in him by the release, and the issue can recover only the estate-tail. *Co. L. 266. a.*

But if the right was precedent to the defeasible possession, if the possession be recovered, the right does not accompany it; as, if a disseisee disseises the heir of the disseisor, who recovers against him, yet the right remains in the disseisee. *Ibid.* So,

So, if the disseisee disseises him, and enfeoffs *A.* upon condition, and enters for the condition broken, and then the heir of the disseisor recovers against him. *Co. L. 266. a.*

If a woman dowable disseises the heir, who recovers against her; her right to the dower remains. *Ibid.*

So, if a right be transferred to a defeasible possession by act of law; as, if *A.* disseises the heir of the disseisor, and enfeoffs the heir apparent of the disseisee of full age, to whom the right afterwards descends, and the heir of the disseisor recovers against him; yet his right remains. *Ibid.*

(B 6.) *By way of extinguishment.*] But if a lessee for years, the reversion in fee, be disseised, and the lessee releases his right to the disseisor, his right is extinct, and he in reversion may enter immediately; for the disseisor has no term upon which the right of the lessee can vest, and therefore it shall enure by extinguishment. *Co. L. 276. a.*

So, a release by a disseisee, when his entry is not lawful, enures by way of extinguishment. *Semb. ante, (B 4.)*

As to the releasor himself, it enures by way of extinguishment; for his right, as to himself, is extinguished. *Co. L. 279. b.*

So, a release by a disseisee, when his entry is tolled, or not *congeable*, has the effect of a release, which enures by way of extinguishment; because all former estates, tho' wrongful or defeasible, stand in force against the releasee. *Ibid.*

But if any, who had title against the releasee before the release, after such release brings a writ of right, and the *mise* is joined upon the mere right, the grand assise shall find for the releasee; for he had the right, tho' the entry of his releasor was not *congeable* at the time of the release. *Lit. f. 478.*

So, if he to whom a release is made, cannot take the thing released, it enures by way of extinguishment; as, if the lord releases to his tenant all his right in the seignior, or in the land, his seignior is extinct; for the tenant cannot take the services of himself. *Co. L. 279. b.*

So, if he who has a rent, common, &c. releases to the terretenant. *Lit. f. 480.*

(C) Release to enlarge an Estate.

(C 1.) What shall be a good one.

RELEASES of an estate in lands and tenements enure to enlarge the estate of the releasee, or by way of passing the estate.

A release to enlarge an estate is, when he in reversion, or remainder, releases to his lessee for life, to hold to him and his heirs, or to him and the heirs of his body; he thereby has an estate in fee, or in tail. *Lit. f. 465.*

So, if he releases to his lessee for years to hold for life, in tail, or in fee. *Ibid.*

Or, to his tenant by statute-staple, merchant, or *elegit*. *Co. L. 273. b. 270. b.*

Or, to his lessee at will. *Lit. f. 460.*

So, if a lessee for life, or for years, takes husband, a release by the lessor

lessor to the husband in fee, tail, &c. will be good to enlarge his estate; for the husband has the freehold, or term, in right of his wife. *Co. L. 273. b.*

So, if a lessee for life makes a lease for years, or at will, and then the lessor releases to the lessee for life and his heirs, it will be good; for the possession of the lessee for years, or at will, is his possession. *Co. L. 270. a.*

So, if a lessee for 40 years demises for 5 years to *B.* who enters; the lessor may afterwards release to the first lessee to enlarge his estate. *Ibid.*

So, if a lease be for life, or for years, remainder for life, the lessor may, by release to the lessee, enlarge his estate. *Co. L. 273. a.*

So, if a man leases for years to *B.*, remainder for years, and *B.* enters; the lessor may, by release to him in remainder, enlarge his estate. *Co. L. 270. a.*

Or, if he leases for years, remainder for life, he may release to him in remainder. *Co. L. 273. a.*

So, if the lessor grants the reversion, after an estate for life, or years, to another for life, he may release to the grantee. *Ibid.*

So, if he leases to *B.* for life, remainder to *A.* for life, and *B.* dies; he may release to *A.* to enlarge his estate before his entry. *Co. L. 270. b.*

So, if a lease be for 10 years, remainder to *B.* for 20 years; *B.* may release to the lessee, and he shall have an estate for 30 years. *Co. L. 273. b.*

(C 2.) What not.

But a release will not be good to enlarge an estate, if there be not apt words; as, if he in reversion or remainder releases to his lessee for life, without more, he has no greater estate; for he had it for life before, and therefore his estate is not enlarged. *Lit. f. 465.*

If he releases to his lessee at will all demands. *R. Cro. El. 268.*

So, if a man releases to his lessee, the words do not make a greater estate, than if the same words were in a deed of the same estate executed with livery. *Lit. f. 465.*

And therefore, if he releases to a lessee for years generally, he has it only for life, without words of inheritance. *Ibid.*

If he releases to his lessee *pur autre vie*, he has it for his own life. *Co. L. 273. b.*

So, a release will not be good to enlarge an estate, if he to whom it is made has not a sufficient estate; as, if tenant by the curtesy assigns his estate, a release to him, after the assignment, is not good, tho' there be a privity between them. *Co. L. 273. a.*

Tho' he has an estate by *estoppel*, and supposition of law; as, if an infant leases to *B.* for life, who grants his estate with warranty to *A.* who in a *dum fuit infra aetatem* vouches *B.*; a release by the demandant to *B.* does not enlarge his estate, tho' he is tenant in supposition of law. *Co. L. 273. a.*

So, if a release be to a lessee for years before his entry; for till he enters by force of his lease he has only an *interesse termini*, and cannot take a release to enlarge his estate. *Lit. f. 459.*

So, a release will not be good to enlarge an estate, if there be not a privity between the releasor and releasee.

As, if a man leases to *B.* for life, who leases for years to another; a release by the first lessor to the lessee for years will be void to enlarge his estate, for want of privity. *Co. L. 273. a.*

So,

So, if a donee in tail leases for his own life, a release by the donor to the lessee and his heirs does not enlarge his estate. *Co. L. 273. a.*

So, if a lessee for 20 years demises to *B.* for 10 years, a release by the first lessor to *B.* does not enlarge his estate. *Ibid.*

So, if a lessor releases to a tenant by sufferance, it is not good to enlarge his estate for want of privity. *Lit. f. 461. R. 2 Cro. 169.*

(D 1.) Release, which enures by passing the Estate.

SO, a release of an estate may enure by way of passing the estate.

As, if there are two parceners, and one of them releases all his right in the land to his parcener. *Co. L. 273. b.*

So, if there are two joint-tenants, and one of them releases to his companion; tho' it does not make a degree. *Ibid.*

So, if a grant be to husband and wife, and *B.* and their heirs, *B.* may release to the husband alone, or to the wife alone, and it will enure by way of passing the estate. *Co. L. 273. b. R. 1 And. 45.*

So, if there are three joint-tenants, and one of them releases to one of his companions. *Co. L. 273. b.*

So, if one joint-tenant confirms the estate of his companion, with words of inheritance. *Lit. f. 523.*

So, if joint-tenants lease for life, and afterwards one of them releases to his companion, or confirms his estate, the reversion is vested in the releasee, and he shall have the rent or waste, without attornment. *Lit. f. 574.*

If one joint-tenant levies a fine, or grants by the words *dedi & concessi*, to his companion, this will enure by way of release, and not as a grant. *R. Jon. 55.*

So, every conveyance by one joint-tenant to his companion enures by way of release, and passes the estate, and the releasee shall have the whole, as by the first feoffment. *2 Cro. 696.*

Tho' it be by way of use; as, if the one, by deed indented and inrolled, bargains and sells to the other. *2 Cro. 696. R. Ray. 187. 2 Sand. 96.*

Or, conveys by fine *sur grant and render.* *R. 2 Cro. 696.*

(D 2.) What shall be a good one.

A release, which enures by passing the estate, may pass the fee without words of inheritance; for he to whom it is made had an inheritance before. *Co. L. 273. b.*

So, if a lease be to two for years, the one may release to the other before entry. *Co. L. 270. b.*

Or, if the lease be to commence at a future day, before the commencement of the lease.

So, if the next avoidance be granted to two, the one may release to the other before the church becomes void. *Co. L. 270. b.*

So, if a parcener of a rent takes to husband the terre-tenant, the other parcener may release to her, and this enures by way of passing the estate, tho' the rent be suspended. *Co. L. 273. b.*

(D 3.) What not.

But a release will not be good by way of passing the estate, if there be

be not a privity of estate between them at the time of the release. *Co. L. 273. b.*

[If a defendant, who is sued by a *landlord* in the name of his *tenant*, procure a release from the nominal plaintiff, the court will order the release to be given up, and permit the landlord to proceed in his action. *Doug. 407.*]

(E) Release of Personal Things.

(E 1.) Of all Demands.

THE most beneficial release which a man can have, is a release of *all demands*. *Lit. f. 508.*

By a release of *all demands*, all actions real, personal, and mixed, and all actions of appeal, and also all executions, are discharged. *Lit. f. 508.*

So, all covenants, personal or real; as, warranty, &c. bonds and contracts. *Co. L. 291. b.*

Tho' the warranty be future; for it binds his lands *in presenti*. *2 Cro. 170.*

All recognizances, statutes-merchant, and staple. *Co. L. 291. b.*

All rents, service, charge, seck, or annuities. *Co. L. 291. b. Lit. f. 510.*

So, common of pasture, and all profits *aprendre*. *Co. L. 291. b.*

All conditions before breach, or performance, or after. *Co. L. 291. b. Per two J. Dal. 105.*

So, a right or title to land. *Lit. f. 509.*

And where there is *debitum in presenti*, a release of *all demands* discharges it, tho' the money be not yet payable; as, money to be paid at a future day, by a bond, covenant, or contract. *2 Cro. 300.*

So, where a rent does not attend the reversion, but is in gross, such release discharges all arrears, and all which may afterwards accrue. *Cro. El. 606. R. 2 Cro. 487. 2 Rol. 408. l. 15. Per three J. 1 Sid. 141.*

As, where a lessee assigns all his term to *A.* rendring *50l. per ann.* to him; a release discharges all future payments; for it is due only by the contract. *2 Cro. 487.*

But a release of *all demands* by the king does not discharge a right or title. *Co. L. 291. b.*

So, where a thing is not payable directly by the contract, and is not yet due; a release of *all demands* does not discharge it; as, if upon a submission to an award by bond, &c. money is awarded to be paid at a day after the release. *Semb. 2 Cro. 300. R. cont. Yel. 214.*

So, such release does not discharge rent incident to a reversion, not due. *Cont. 2 Rol. 408. l. 15. R. acc. Cro. El. 606. Per Hought. 2 Cro. 487. Per three J. 1 Sid. 141. R. H. 1 W. & M. B. R. inter Stephens and Snow, Sal. 578.*

Nor, a collateral covenant to be formed *in futuro*. *R. 2 Cro. 170. R. 2 Mod. 281.*

So, a release of *all demands* to the bail, before judgment against the principal, does not discharge the recognizance by the bail. *R. 2 Cro. 170.*

So, a release of *all demands* by an husband, does not discharge an *assumpsit* to the wife before the coverture, to pay her *40s. per ann.* after the

the death of her husband. *R. 2 Cro. 222. Yel. 156. Vide Baron and Feme (K).*

So, a release of *all demands*, in general words, shall be restrained to the particular occasion; as, if an executor, upon payment to him of a legacy by the executor of *B.*, releases all demands against him as executor for any matter whatsoever; this does not release a debt due to his testator from *B.* *R. 3 Lev. 274. Sho. 150. 3 Mod. 277. Carth. 119. R. 2 Lev. 215.*

So, if he had released *all demands* generally. *Per Holt, Sho. 155.*

Or, *all demands on the personal estate*; for a debt does not bind it till judgment. *R. Sal. 575.*

(E 2.) Claim, Right, &c.

So, a release of *all claims* extends to all demands. *Co. L. 291. b.*

So, *all exactions* seem equal to demands. *Co. L. 292. a.*

A release of *all right* extends to a title of entry. *Co. L. 265. a. R. 8 Co. 153. b.*

So, a release of *all title* extends to a right in land. *R. 8 Co. 153. b.*

(E 3.) Actions, &c.

By a release of *all actions*, actions real, personal, or mixed, are discharged.

So, appeals for death, robbery, mayhem, &c. *Lit. f. 500.*

So, a *scire facias* upon a judgment or fine; for every writ, original or judicial, upon which the defendant may plead, is an action. *Lit. f. 505, 506.*

So, a release of *actions* discharges all causes of action. *Co. L. 285. a.*

A bond for payment of money at a future day; for it is *debitum in presenti*, and a right to an action is in him, tho' he cannot have an action at present. *Lit. f. 512.*

So, a release by an executor before probate discharges an action, tho' he cannot have it; for the right is in him. *Co. L. 292. b. Vide Administration, (B 9.)*

So, a release by the ordinary, tho' he cannot have an action. *Co. L. 292. b.*

So, a release of *all quarrels* discharges all actions and causes of action. *Co. L. 292. a.*

Or, if he releases *omnes loquelas*. *Co. L. 292. a.*

All suits, debates, or controversies. Ibid.

So, a release of *all real actions* discharges actions real or mixed; as, *assise, quare impedit*, annuity. *Lit. f. 492, 493.*

So, a release of *personal actions* discharges all personal actions, and all mixed, in which damages were recoverable by the common law. *Co. L. 285.*

But a release of *all actions* does not release a right to enter, where entry is not tolled, &c. *Co. L. 286. a.*

So, a man may enter into land, or take goods, &c. notwithstanding a release of *all actions*. *Lit. f. 496, 7, 8.*

So, he in remainder, a feoffee, or other not privy, shall not plead a release of *actions* to tenant for life, &c. *Co. L. 285. b.*

So, a disseisor cannot bar an assise, by a release of *real actions*. *Lit. f. 494.*

So,

So, releases of *personal actions* do not discharge real actions, in which damages are given by statute, if they were not at the common law; as, dower, *mortd'ancestor*, *aid*, *entry sur disseisin en le per*, &c. *Co. L.* 285. *b.*

So, in an assise by joint-tenants, a release of *personal actions* by one of them bars himself only. *Co. L.* 285. *a.*

So, a release of *all actions* before the day of payment of a rent, annuity, &c. is no bar to arrears afterwards due. *R. Cro. El.* 897.

So, if an agreement be, that *A.* shall release the equity of redemption, and *B.* shall pay for it 7*l.* *A.* releases the equity and all actions; this does not discharge an action for the 7*l.* *R. 1 Sal.* 171.

[A *remittit damna* of so much is a release for so much, and is like acknowledgment of satisfaction, and there need not be judgment *quod eat sine die* as to that part. *Eyre v. Mount*, *H. 9 Geo. 2.* *B. R. H.* 207.]

(E 4.) Covenants.

So, a release of *all covenants* is a good discharge of a covenant before it is broken, as well as after. *Co. L.* 292. *b.*

But if the lessor, after assignment by him to another, releases *all covenants* to his lessee, and afterwards the assignee of the reversion brings covenant against the lessee; such release before breach does not discharge the defendant; for the lessor, after the assignment, cannot discharge the action, which shall be intended to be founded upon a covenant in law. *R. 2 Lev.* 206, 7.

Vide more concerning Release in Appeal, G 12.)—*Bail*, (Q 7.)—*Chancery*, (4 L 1, &c.)—*Damages*, (E 8.)—*Discontinuance*, (C 1.)—*Fine*, (E 10.)—*Pleader*, (2 G 14.—2 V 11.—2 W 30. 34.—2 X 7.—2 Y 17.—3 B 19.—3 M 12.—3 O 8. 16.)

R E L I E F.

Vide Copyhold, (K 11.)—*Pleader*, (3 K 17.)

Relief in Equity.

Vide Chancery.

Relief of Poor.

Vide Uses, (N 1.)

R E L I G I O N.

Vide Justices of Peace, (B 13, &c.)—*Scotland*, (D 3.)

The Thirty-nine Articles.

Vide Esglise, (N 10.)

R E M A I N D E R.

Vide Copyhold, (C 11.)—Devise, (N 19.)—Estates, (B 13, &c.—31.)—Pleader, (3 E 3.)

Remainder-Man.

Vide Receipt, (A 2.—B 2.)—Recovery, (B 7.)

Cross Remainders.

Vide Devise, (N 14, 15.)

Contingent Remainders.

Vide Estates, (B 16.)

Vested Remainder.

Vide Estates, (B 17.)

R E M E D Y.

Mutual Remedies.

Vide Pleader, (C 56.)

Other Remedy.

Vide Abatement, (H 50.)—Action upon the Case, (B 8.)—Action upon the Case upon Assumpsit (C).—For a Deceit, (E 5.)—Appeal, (G 10.)

R E M E M B R A N C E R.

Of the Exchequer.

Vide Courts, (D 12.)

R E M I T T E R.

(A) Remitter; when it shall be.

(A 1.) If an antient Right and defeasible Estate come together by Descent.

REMITTER is, when an antient right in lands or tenements, which is remediable, and a defeasible estate or title, in the same tenements, come to the same person, without default in him, he shall be remitted to his antient and better right. *Co. L. 347. b.*

As, if tenant in tail makes a discontinuance, and afterwards disseises the discontinuee, and dies, whereby the right to the tail and the defeasible estate in the fee descend together to his issue; the issue shall be remitted to the estate-tail. *Lit. f. 659.*

So,

So, if tenant in tail, after a discontinuance, dies without issue, and he in remainder enters, and dies seised, his issue shall be remitted. *R. Bend. pl. 34.*

If the husband discontinues the land of his wife, and takes back an estate to himself in fee, and dies after his wife, their issue shall be remitted. *2 Rol. 420. l. 17.*

So, if a subsequent right comes to a former, tho' the former was also defeasible. *2 Cro. 489. Vide post. (B 1, 2, 3.)*

(A 2.) Or, the Right descends after the Estate.

So, there shall be a remitter, if the right descends after the defeasible estate; as, if tenant in tail enfeoffs his issue within age, and afterwards dies, the issue shall be remitted. *Lit. f. 660. Hob. 71.*

Tho' the issue came to his full age in the life of tenant in tail, and did not waive the feoffment. *Lit. f. 660.*

If tenant in tail makes a feoffment to the use of himself for life, remainder to his son in tail, with condition; the son breaks the condition, whereby the use and possession accrue to his issue, and the father dies; the issue shall be remitted. *R. 1 Leo. 91.*

If tenant in tail enfeoffs to the use of himself for life, remainder to his son, (who is the issue in tail,) and afterwards dies, the son, tho' he takes the remainder by the *sf. 27 H. 8. 10.* shall be remitted by the descent of the right. *1 Leo. 91. Vide post. (C 5, 6.)*

(A 3.) Or, the Estate after the Right.

So, if a defeasible estate comes to him after [a descent of the right, he shall be remitted; as, if a discontinuee, after the death of tenant in tail, enfeoffs his issue within age. *Co. L. 350. a.*

(A 4.) Or, by other Act of Law.

So, if the discontinuee, being a woman, the issue in tail within age takes her to wife, he shall be remitted to the whole; for he becomes seised in her right, and there are no moieties between them. *Lit. f. 665.*

So, if a husband, seised in right of his wife, aliens in fee, and takes back an estate to him and his wife, the wife shall be remitted; for the taking back of the estate shall be reputed the act of the husband alone, and not of the wife, who was *covert*. *R. 1 Sid. 63.*

So, if the discontinuee be disseised, and the disseisor leases to the husband and wife for life. *Lit. f. 678.*

So, if the alienee makes a lease to the husband and wife for their lives, reserving the reversion to himself, it shall be a remitter to the wife, and the reversion shall be out of the lessor. *Lit. f. 666.*

So, if an estate be taken back to the husband and wife, only for the life of the husband. *Co. L. 350. b.*

Tho' the estate to them be by indenture. *Co. L. 353.*

Or, by fine; for the wife shall not be examined upon it. *Lit. f. 669.*

So, if tenant in tail enfeoffs his issue within age, and his wife, and dies; the issue shall be remitted to the whole, upon the death of tenant in tail. *Co. L. 351. b.*

So,

So, if tenant in tail discontinues, and dies, leaving a daughter his heir in tail, who after full age takes husband, and the discontinuee releases to the husband and wife for their lives, the wife shall be remitted. *Lit. f. 671.*

So, if a husband discontinues the land of his wife by fine, and the conveyance renders to the husband and wife, tho' this be error, and the fine may be avoided; for not being party to the original or conveyance, the wife cannot take, except in remainder, yet she shall be remitted. *Co. L. 353. a. Vide post. (B 1.)*

So, if the discontinuee makes a feoffment and livery to the wife without her husband. *Lit. f. 677.*

Tho' the husband afterwards disagrees to the feoffment, or the wife waives it after the death of her husband. *Co. L. 356. b.*

So, if husband and wife are tenants in special tail by a gift after marriage, by which they take by entireties, and the husband discontinues, and takes back an estate to him and his wife, they are both remitted; for the one cannot be without the other. *Lit. f. 672.*

So, since the statute of uses, if he takes back an estate by fine, or feoffment. *R. Hob. 255. 1 Sid. 63.*

So, if husband and wife recover against lessee for life of the husband by writ of entry in the *post. Semb. per Dyer, Mo. 32.*

If tenant in tail makes a feoffment to the use of himself for life, and then to *A.* for years, and says nothing of the fee, and dies, by the descent of the reversion the issue shall be remitted. *2 Rol. 419. l. 50.*

So, if the discontinuee makes an estate to the husband for life, remainder to the wife for life, it shall be a remitter to the wife, when the remainder to her comes into possession. *Lit. f. 680.*

So, if tenant in tail leases to his eldest son for life, remainder to the younger, and the eldest dies without issue, the younger son shall be remitted by the accruing of the remainder to him. *Lit. f. 682. Vide post. (C 5.)*

Or, if the heir of the disseisor leases to *A.* for life, remainder to the disseisee, he shall be remitted after the death of *A.* *Lit. f. 683.*

(A 5.) And if Part of the Estate comes to the Right, it shall be a Remitter for so much.

So, if only part of a defeasible estate comes to him who has a right, he shall be remitted for so much; as, if tenant in tail to him and the heirs of his body upon *A.* begotten, has a daughter, and afterwards has issue a daughter by another *venter*, and discontinues, and afterwards disseises the discontinuee, and dies, whereby the estate descends to the two daughters; the daughter by *A.* shall be remitted to a moiety. *Lit. f. 662. Vide post. (C 4.)*

So, if tenant in tail enfeoffs his issue within age, and *B.*, and dies, the issue shall be remitted to a moiety. *Lit. f. 663.*

So, if disseisee, when his entry is *congeable*, takes back an estate (without indenture, or matter of record which estops him) from the disseisor, he shall be remitted. *Lit. f. 693, 694. 696.*

Tho' he takes but a lease for years. *Lit. f. 695.*

So, in a *formedon* by the issue in tail, if the discontinuee disclaims, or pleads *non-tenure*, it shall have the effect of a remitter. *Lit. f. 691, 692.*

(B) Remitter favoured by Law.

(B 1.) And therefore it takes effect; though the Estate which made the Remitter was voidable.

REMITTER is favoured in law; for by it the antient right is restored, which is the more worthy and more sure title. *Co. L. 348.*

And therefore, if the defeasible estate was obtained from an infant, or *feme-covert*, yet there shall be a remitter; as, if tenant in tail discontinues, and afterwards disseises the discontinuee, and dies; his issue shall be remitted, though the discontinuee was an infant, or *covert*. *Co. L. 348. a.*

If a husband discontinues the land of his wife, by fine, to *A.* who renders to the husband and wife, tho' the fine be erroneous, (for the wife not being a party to the original, or conusance, cannot take by the render a present estate,) she shall be remitted. *Co. L. 353. Vide ante, (A 4.)*

If the discontinuee enfeoffs the wife, and makes livery to her only, tho' the husband afterwards disagrees. *Co. L. 356. b. Vide ante, (A 4.)*

If tenant in tail to him and the heirs females of his body discontinues, and takes back an estate in fee, and dies having issue a daughter, and his wife *privement enseint*, the son born afterwards shall not void the remitter to the daughter. *Co. L. 357. a.*

So, if the discontinuee makes a feoffment to husband and wife, upon condition, it shall be a remitter to the wife, tho' the feoffor afterwards enters for the condition broken. *Co. L. 357. b. Lit. f. 679.*

So, if tenant in tail enfeoffs his younger son, and dies, and the younger son dies, his wife *privement enseint*, the eldest son enters, and then the wife has a son born; he shall not enter; for the eldest was remitted. *R. 1 And. 31.*

(B 2.) A Remitter defeats entirely the wrongful Estate.

So, by the remitter the defeasible estate shall be utterly annulled and defeated. *Lit. f. 659. 665, 666. Vide post. (F).*

And therefore if he who has a defeasible estate grants a common, rent, &c. out of the land, and afterwards is remitted, the land shall be discharged; for the estate out of which it issued is totally defeated. *Lit. f. 660. 686, 687.*

So, if he annexes a condition, &c. to the estate made by him. *Lit. f. 679.*

So, the remitter avoids all charges of a stranger or ancestor, made after the commencement of the defeasible estate. *2 Rol. 422. K.*

So, the estate, to which the remitter is, shall be subject to dower, ward, &c. as before. *2 Rol. 422. l. 15.*

But an estate of the land itself, made by him who is remitted, as a lease for years, shall not be defeated by the remitter. *Co. L. 349. a. Dy. 51. b. 2 Rol. 422. l. 30.*

So, other remedy for the rent, common, &c. is not taken away; for he may have *annuity*, &c. notwithstanding the remitter. *Co. L. 349. a.*

(B 3.) And that presently without Entry.

So, the defeasible estate shall be defeated without entry. *Co. L. 348. a. R. 1 Rol. 260. Hob. 256. 2 Rol. 421. l. 30.*

For it shall be defeated immediately by the vesting of the estate which makes the remitter. *Co. L. 354. b. 356. b. Hob. 255.*

Tho' it vests by act of law, without the assent of the party. *Co. L. 358. b.*

So, if the estate vests, he cannot waive the remitter; for he shall be remitted *nolens volens*. *R. 2 Cro. 489.* For the benefit of him in remainder, otherwise not. *2 Rol. 422. l. 40.*

Tho' the antient estate and the last were both waiveable, he cannot waive the remitter, where it would be to the prejudice of another. *Co. L. 357. Hob. 71. 255. Mo. 872. Per three J. Montague cont. 2 Cro. 489. 2 Rol. 36. Vide Baron and Feme (T).*

So, if the remitter be prevented by the default of the father, his heir may be remitted; as, if the discontinuee enfeoffs tenant in tail, of full age, who shall not be remitted contrary to his own act, yet his issue shall be remitted.

If husband and wife levy a fine, and afterwards take back an estate to them; tho' the wife, being *particeps* by her examination upon the fine, cannot be remitted, her issue shall. *Co. L. 353. b. Vide post. (C 6.)*

So, if tenant in tail leases to his eldest son for life, remainder to a younger son for life, and dies, and then the eldest son dies without issue, the younger shall be remitted, tho' the eldest, who accepted the lease, could not. *Lit. f. 682.*

(B 4.) A Remitter to the Principal remits to the Appendant.

So, if a man be remitted to the principal, he shall be remitted to all things appendant, &c.; as, if tenant in tail of a manor, with an advowson, &c. appendant, enfeoffs *B.* who re-enfeoffs him, saving the advowson; the issue shall be remitted to the manor, and also to the advowson. *Co. L. 349. b.*

So, if tenant in tail was disseised by *A.* who suffers an usurpation, and the disseisee enters, he shall be remitted to the manor with the advowson. *Co. L. 349. b.*

(B 5.) To the particular Estate, remits to him in the Reversion or Remainder.

So, a remitter to a particular estate shall be a remitter to all in remainder or reversion. *Lit. f. 673. Hob. 255. Pol. 397.*

Tho' the remainder vests by the statute of uses. *27 H. 8. 10. Hob. 256.*

So, if a *mesne* remainder be barred, it shall be a remitter to all other remainders or the reversion; as, if *A.* be tenant for life, remainder to *B.* in tail, remainder to *C.* in tail, remainder to *D.* in fee, and *A.* is disseised by *E.* to whom *B.* releases with warranty, whereby the estate-tail is barred, if *A.* afterwards re-enters, the remainders to *C.* and *D.* are remitted, tho' the disseisor has a fee, determinable upon the death of *B.* without issue. *Co. L. 354. b.*

So, if tenant in tail, remainder in *B.* in fee, discontinues, and afterwards takes back an estate to him in tail, remainder to the king

in fee, and dies, his issue shall be remitted, and the remainder to *B.*, tho' the remainder to the king be thereby devested. *Co. L. 354. b.*

But if tenant in tail dies after discontinuance, without issue, and he in remainder disseises the discontinuee, and dies without issue, he in the second remainder cannot enter. *R. Bend. pl. 34.*

(C) When there shall be no Remitter.

(C 1.) To a bare Title.

BUT a remitter must be to the antient right, and shall not be to a naked title; as, if a defeasible estate be in him who has title to enter for a condition broken, he shall not be remitted to the estate which he had before the condition made. *Co. L. 347. b. 2 Rol. 420. G.*

Or, if he has title to enter for *mortmain*. *Co. L. 347. b. 348. a.*

Or, upon an assent to a ravisher; for it is a bare title of entry, for which no action is given. *Co. L. 348. a.*

But if an infant makes a feoffment of the estate of his wife, and within age takes back to him and his wife; tho' he had only a title to enter for his nonage, he shall be remitted. *2 Rol. 419. l. 30.*

So, if a woman enfeoffs *A.* and *B.* upon condition to re-enfeoff her upon request, and takes husband, and upon request *A.* refuses, but *B.* enfeoffs them of the whole, she shall be remitted to the moiety of *A.* to which she had title of entry for the condition broken. *2 Rol. 419. l. 35.*

(C 2.) To an irremediable Right.

So, there shall be no remitter to a right for which the party has no remedy by action. *Co. L. 348. a. 349. b.*

As, if *B.* purchases an advowson, and afterwards suffers an usurpation, and six months pass, and then the usurper enfeoffs *B.* and his heirs, the heir of *B.* shall not be remitted; for tho' he had right, he had not any remedy by action. *Co. L. 349. b.*

So, if tenant in tail enfeoffs *B.* of a manor with an advowson, &c. appendant, and afterwards *B.* grants to him and his heirs the advowson, or other thing appendant, and he dies, his issue shall not be remitted till he re-continues the manor; for there was no remedy by action for the advowson, &c. till the manor was re-continued. *Co. L. 349. b.*

So, if he makes a discontinuance, and afterwards disseises the discontinuee, and levies a fine, and dies within five years, the discontinuee may enter; for the issue is not remitted, his right being barred by the fine. *R. Bend. pl. 156. Mo. 115. 1 And. 43.*

So, if there be a grandfather tenant for life, remainder to a father in tail, and they join in a feoffment with warranty, and the warranty descends with the right to the son; he shall not be remitted, being bound by the warranty. *R. 1 And. 286. 2 Rol. 421. l. 40.*

(C 3.) To a bare Right of Action.

So, there shall be no remitter, where the party has no right but only to have an action; as, if tenant in tail suffers a common recovery, which was erroneous, and afterwards disseises the recoveror, and dies, his issue shall not be remitted; for tho' he has a right to have

have a writ of error for reversal of the recovery; yet, till the reversal, he has no right to the estate-tail. *Co. L. 349. b.*

(C 4.) If the Freehold does not accrue to the Right.

So, there shall be no remitter, except where an estate of freehold comes to him who has the antient right; and therefore, if tenant in tail before the *β. 27 H. 8. 10.* had made a feoffment to the use of himself in fee or tail, the issue was not remitted. *Dy. 24. a.*

So, there shall be no remitter till the freehold comes in possession to him who has the right; as, if discontinuee of a husband re-grants an estate to the husband for life, remainder to the wife; she shall not be remitted during the life of the husband. *Lit. f. 680. R. Hob. 71.*

If tenant in tail enfeoffs *A.* to the use of himself for life, and afterwards to *A.* till he raises 500*l.*, and then to his son in fee, who enters after the death of his father; he shall not be remitted till *A.* has levied the 500*l.* *R. 1 Leo. 7.*

So, there shall be no remitter, but only as to so much as comes to him without his default; as, if tenant in tail to him and the heirs of his body by *A.* has issue a daughter, and by another wife has issue another daughter, and then discontinues, and disseises the discontinuee, and dies, his daughter by *A.* shall be remitted only to a moiety; for a moiety only descended to her. *Lit. f. 662. Vide ante;*

(A 5.)

So, if tenant in tail enfeoffs his issue within age, and a stranger, and dies, tho' joint-tenants are seised *pro indiviso* of the whole, yet the issue shall be remitted only to a moiety; for he has no right to more. *Co. L. 350. a.*

If husband discontinues, and takes back an estate to him and his wife, and to *A.*, the wife is remitted only to a moiety. *Lit. f. 676.*

(C 5.) If there was Default in him who takes the defeasible Estate.

So, there shall be no remitter, if he who has the defeasible estate was *particeps criminis*, and consented to the making of the defeasible estate; and therefore, if tenant in tail enfeoffs his issue of full age, and dies, the issue shall not be remitted; for it was his folly to accept the feoffment. *Co. L. 348. b. 350. b.*

Or, if the issue at full age takes the discontinuee to wife. *Lit. f. 665.*

Or, if the issue joins with his father in a disseisin to the discontinuee. *Co. L. 357. b.*

If a stranger enfeoffs a tenant after possibility in remainder after an estate for life, and the lessee dies, he in remainder shall not be remitted. *2 Rol. 420. l. 25.*

So, if a husband and wife levy a fine to *B.* upon which the wife is examined, and afterwards they take back an estate to them, the wife shall not be remitted; for by her examination upon the fine, she became *particeps*. *Co. L. 353. b.*

Or, if they make a feoffment to the use of themselves. *Semb. 1 Lev. 49.*

If a husband discontinues the land of his wife, and *A.* disseises the discontinuee by *convin* of the husband, and also of his wife, and makes a lease to them, the wife shall not be remitted. *Lit. f. 678. 2 And. 39.*

Tho' the wife was not present, but only assented to the disseisin, tho' by such assent she be not a disseisorefs. *Co. L. 357. b.*

So, if he who has a right procures a disseisin by *A.* against whom he recovers. 2 *Rol.* 420. *l.* 7.

Tenant for life, remainder to *A.* for life, *A.* disseises the tenant for life, who dies; *A.* shall not be remitted. *Cont.* 2 *Rol.* 420. *l.* 30.

So, if tenant in tail lets to *B.* for life, remainder to his issue by deed, and the issue agrees to the remainder in the life of his father, by signing a counterpart of the deed, &c. the issue shall not be remitted, tho' the freehold is cast upon him. *Co. L.* 359. *b.*

If lessee for life surrenders to *D.* in remainder, &c. and *D.* accepts it, he shall not be remitted. *R. Skin.* 3. 63.

So, if tenant in tail enfeoffs his issue and *B.* by deed, and makes livery to *B.* only, yet if the issue signs the deed, he shall not be remitted on the death of *B.*, tho' the freehold is cast upon him by survivorship. *Co. L.* 359. *b.*

So, if *B.* dies in the life of the tenant in tail, and the issue afterwards enters, and takes the profits. *Lit. f.* 684.

Or, agrees to the feoffment in the life of his father. *Co. L.* 359.

If there be father, tenant for life, remainder to the son for life, remainder to the father in tail, and the father and son join in a feoffment to an uncle of the son, who dies without issue, so that the son is his heir, he shall not be remitted during his life; for he joined in the feoffment. *Dub.* 1 *Leo.* 37.

But if a party to a wrongful act, or an estate taken back, be an infant, or *feme-covert*, no default shall be adjudged in him or her generally. *Vide ante*, (A 4.)

As, if husband, seised in right of his wife for the life of the wife, makes a feoffment to the use of the wife for life; upon the death of the husband, she shall be remitted. *R.* 3 *Leo.* 93.

So, where an estate of freehold is cast upon him or her by act of law, no default shall be adjudged in him or her; as, if a remainder was limited to him or her, without his or her assent, and the particular estate determines. *Lit. f.* 682, 683. 1 *Leo.* 91. *Vide ante*, (A 4.)

So, if tenant in tail enfeoffs his issue and *B.* by deed, and makes livery to *B.* and the issue was not consuant, nor took the profits in the life of his father, he shall be remitted, if he survives *B.* *Lit. f.* 684. Or, if the issue was within age. 2 *Rol.* 419. *l.* 25.

So, if a disseisor lets to the disseisee for life, by indenture, and makes livery, the disseisee shall be remitted contrary to his acceptance. *R. Cro. El.* 20.

(C 6.) If he takes by *ft.* 27 *H.* 8. 10. which executes the Use in the same Plight as it was limited.

So, since the *ft.* 27 *H.* 8. 10. if tenant in tail makes a feoffment to the use of his issue within age, and dies, the issue shall not be remitted; for the statute executes the possession to the party in the same plight, manner, and form, as the use was limited. *Co. L.* 348. *b.* *Hob.* 298. *Dub. Dy.* 23. *b.* 54. *R. Dy.* 54. *b.* 77. *b.* 106. 1 *Rol.* 260.

And tho' it be found by office that there was a remitter, it is of no avail. *R. Dy.* 106.

Tho' the issue takes by remainder in an use limited to him. *Semb. Dy.* 129. *a.*

So,

So, if the issue enters, and is seised by the *ft.* 27 *H.* 8. he cannot, by the entry of the feoffees afterwards, be remitted. *R. Dy.* 330. *a.*

But if the issue, in such case, waives the possession, and recovers in *formedon* against the feoffees of the tenant in tail, as he may, he shall be remitted. *Co. L.* 348. *b.* 2 *Rol.* 10.

Or, if the issue takes by the feoffment to his use, and does not bring *formedon*; after his death, his issue shall be remitted; for an estate in fee at the common law descends to him. *Co. L.* 348. *b.* *Dy.* 54. 1 *Leo.* 91.

So, if the husband makes a feoffment of the land of his wife, to the use of himself and his wife, she shall be remitted; for she has her election to take by the *ft.* 27 *H.* 8. or to enter by the 32 *H.* 8. 28. upon which she shall be remitted. *R. Dy.* 191. *b.*

So, the issue of the issue, who takes by force of the *ft.* 27 *H.* 8. 10. shall be remitted. *Hob.* 255. 1 *Rol.* 260. 2 *Rol.* 419. 1. 45.

So, if he who had a defeasible estate as a verdict for him, tho' falsely, and he who has a right claims under the recovery, he shall not be remitted; as, if a younger brother disseises his elder, and in an assise against him the plaintiff is barred by a false verdict, and before attain the younger dies without issue, whereby the land descends to the elder; he shall not be remitted contrary to the verdict. *R. Dy.* 5. *a.*

But if tenant in tail levies a fine, or suffers a common recovery, which is a bar to the entail, the issue shall not be remitted, tho' the land afterwards comes to him. *Vide ante*, (C 3.)

Tho' the estate descends to the issue before execution of the recovery. *Co. L.* 361. *b.* *Dy.* 35. *a.*

(C 7.) No Remitter to a Term for Years.

If lessee for years, to commence at a future day, enters before the day, which is a disseisin, and continues in possession till the term commences, he shall not be remitted; for the law does not divest the fee, for a term, which is of no esteem. 2 *Rol.* 420. 1. 35.

(D) The Grounds of a Remitter.

THE principal cause for a remitter is, that there is not any person, against whom he, who has right, can sue his action; for he cannot sue himself. *Lit. f.* 661.

And because he who has right cannot sue, nor enter upon himself, the remitter has the effect which an entry, if it was *congeable*, would have, and reverts the estate accordingly. *Hob.* 256, 257. 2 *Rol.* 37.

And if he had but a right of action, by the remitter he shall be in, in the same manner as if he had recovered. 2 *Rol.* 37.

(E) How it operates.

IF discontinuee of tenant in tail enfeoffs his issue within age and *B.*, and makes livery of the whole to the issue, he shall be remitted but for a moiety; for it operates as a feoffment in the first place, and then as a remitter. *Co. L.* 350. *a.*

If a defeasible estate descends to two daughters, and one only enters into the whole, and dies, her issue shall be remitted only to a moiety,

moiety, and the other moiety shall be recovered by a *formedon* by the other daughter. *R. Bend. pl. 34.*

But if the defeasible estate descended to two daughters, of whom the eldest has the antient right, they take as tenants in common, and not as parceners; for there shall be a remitter for a moiety immediately. *Lit. f. 662.*

(F) What Effect it shall have.

BY the remitter, all estates made by him, who had the defeasible estate, are avoided.

And therefore, if tenant in tail makes a feoffment to his issue, and dies, and his issue lets for years, and dies, whereby the issue of the issue is remitted, he shall avoid the lease, which becomes *null* without entry. *1 Rol. 260. R. Lane, 94.*

And tho' the issue of the issue accepts rent upon the lease, it does not affirm it; for it was absolutely void by the remitter. *1 Rol. 260. R. Mo. 846.*

So, if tenant in tail enfeoffs another to the use of himself for life, and afterwards to *B.* for years; his issue being remitted to the reversion by descent, shall avoid the term to *B.* *2 Rol. 419. l. 50.*

But if husband and wife are seised to them, and the heirs of the body of the husband, remainder to *A.*, &c. and the husband levies a fine and dies, the wife shall be remitted and all the remainders; but upon the death of the wife, the effect of the remitter ceases. *Hob. 257.*

But if husband and wife are seised to them, and the heirs of their bodies, remainder to *A.*, &c. and the husband levies a fine to the use of himself and his wife, and the heirs of their bodies, whereby they are remitted, and the remainders revived; if the wife dies in the life of the husband, the remitter ceases, and the remainder is turned to a right. *R. Hob. 255.*

So, if tenant in tail discontinues, and is afterwards attainted for high treason, whereby his estate and also the antient right of entail are forfeited to the king upon office found; yet if he dies before office, so that the right and estate descend to the issue who is remitted; by the office found the remitter ceases. *R. Hob. 347. 2 Rol. 508, 9. Pal. 351. 1 Jon. 79.*

R E M O V A L.

Vide Franchises, (F 30, &c.)

Removal of a Replevin.

Vide Pleader, (3 K 6, &c.)

Removal of a Record.

Vide Record (G).

R E N T.

(A) Rent.

RENT is a sum which the tenant renders out of the profits of lands or tenements which he enjoys. *Co. L. 142.*

(B) Reservation.

(B 1.) How it may be made.

RENT may be reserved annually, or every second or third year. *Co. L. 47. a.*

So, it may be reserved upon a lease of lands by *parol*, or deed-poll. *Co. L. 142. b. 143.*

But if a man makes a feoffment, or a tenant for life, or years, grants all his estate, he cannot reserve a rent without deed. *2 Rol. 448. H. Lit. f. 215.*

Nor, where a conveyance enures by way of extinguishment; as, upon a surrender, release, &c. *2 Rol. 448. I.*

(B 2.) By what Words.

A rent may be reserved by the word *reservando*. *Co. L. 47. a.*

Or, the words, *reddendo, solvendo, faciendo*, &c. *Co. L. 47. a. 141. b.*

Inveniundo, dummodo, &c. *Co. L. 47. a.*

So, a demise, *provided that the lessee shall pay*, is a good reservation. *R. 2 Rol. 449. l. 35.*

Or, if a man, *in consideration of rent after mentioned*, lets, and the lessee covenants to pay so much rent, without any *reddendum*, it will be a good reservation. *R. 2 Rol. 449. l. 40.*

So, a devise upon condition that he pay yearly so much to *A.* will be a rent to him, and not a sum in gross. *R. 1 Leo. 137.*

[So, a subsequent agreement may, by relation, operate to make a reservation of rent operate from the beginning of the tenant's occupation. *Cowp. 781. 784.*]

(B 3.) Out of what Thing.

Every rent ought to be reserved out of lands and tenements, which are manurable, and upon which the lessor may distrain. *Co. L. 47. a. 142. a.*

So, out of a demise of the vesture, or herbage of land. *Co. L. 47. a. 142. a.*

Or, grant of a reversion, or remainder, for the possibility that it may come into possession. *Co. L. 47. a.*

Or, a conveyance by way of use; for by the *st. 27 H. 8. 10.* the possession is executed to the use. *R. 2 Co. 54. a. 72. b. 2 Rol. 448. l. 10. 2 Inst. 673.*

So, it may be reserved upon a grant of a future interest. *2 Rol. 446. l. 20.*

But a rent cannot be reserved out of an incorporeal inheritance; as, out of a common, advowson, office, &c. *Co. L. 47. a. 142. a. 144. a.*

Or,

Or, a fair, market, liberty, or other franchise, or privilege. *Co. L. 47. a. 5 Co. 3. a.*

Or, out of tythes. *Co. L. 47. a. R. 2 Rol. 446. l. 35.*

A corody, mulcture of a mill, &c. *Co. L. 47. a.*

So, rent cannot be reserved upon a release of a right to land. *Co. L. 144. a.*

[A rent cannot issue out of a term for years; therefore if lessee for years assign his term, he cannot distrain for rent. *2 Wilf. 375.*]

If land and an incorporeal thing be demised together, rendring rent, it shall issue wholly out of the land in point of remedy. *2 Cro. 453. 2 Rol. 451. l. 20.*

And if an incorporeal thing only be demised, the rent shall not go to the grantee of the reversion without exprefs words; for it is not incident to the reversion. *Co. L. 47. a.*

Yet if rent be reserved upon a demise for years of an incorporeal inheritance, as common, tythes, &c. debt lies for it, in respect of the contract. *Co. L. 47. a.*

Otherwise upon a demise for life

[By the *st. 8 An. 14.* debt may be brought for rent on a demise for life. *Co. L. 47. a.*]

So, such rent descends to the heir with the reversion. *Semb. 2 Sand. 304. Semb. Ray. 18.*

And, if the term be assigned, acceptance of rent from the assignee binds the lessor. *Semb. 2 Sand. 304. Ray. 195.*

So, if the demise was of a barn, or land, with tythes, and the tythes are evicted, the rent shall be apportioned; for it was greater in respect of the tythes. *2 Cro. 453. 2 Sand. 304.*

(B 4.) Of what Thing.

Rent may be reserved not only of money, but also of any other profit, which lies in render. *Co. L. 142. a.*

As, a rose, pepper, comine, wheat, &c. *Ibid.*

So, of a horse, hawk, hen, capon, &c. *Ibid.*

Of spurs, bows, &c. *Ibid.*

So, of a journey *tempore messis*, or labour by the lessee, or with a horse, &c. *2 Sand. 165.*

But it cannot be reserved of parcel of the profits demised; as, reserving the vesture, or herbage of the land. *Co. L. 47. a.*

(B 5.) To whom Rent shall be reserved.

If the reservation of a rent be general, the law generally directs it according to the intent and the nature of the thing demised. *Per Hale, 1 Vent. 161.*

As, if tenant in tail demises for years, rendring rent to him and his heirs, this goes to the heir in tail. *R. 1 Vent. 162.*

If tenant for life, with power to make leases, demises, rendring rent to him, his heirs and assigns, it shall be adjudged to him in remainder. *R. 8 Co. 70. b. 1 Vent. 162.*

If a copyholder, by licence, leases, rendring rent to him and his wife, and his heirs, where by the custom the wife has her *free bench*, the wife shall have the rent, as incident to the reversion. *R. 1 Vent. 163.*

If lessee for 100 years makes a lease for 50 years rendring rent
to

to him and his heirs, it shall go to his executor or administrator. *Per Hale*, 1 *Vent.* 162.

So, if a man seised in fee lets for years, rendring rent during the term to him, his executors and assigns, it shall go to his assignee, or heir; for the intent appears that it shall be paid during the term, and the law directs to whom. *R. cont.* 12 *Co.* 36. *Cro. El.* 217. 2 *Rol.* 450. *l.* 30. 451. *l.* 10. *Ow.* 9. But no mention in *Roll.* 450. and *Owen*, that the reservation was during the term, and the case 2 *Rol.* 451. is falsely reported, as appears *Latch*, 99. 2 *Sand.* 370. *R. acc.* *Cro. El.* 832. 5 *Co.* 111. *Mallory's case.* *Acc. Cro. Car.* 289. *R. Latch*, 255. 264. *R. per tot. Cur.* 2 *Sand.* 370. 1 *Vent.* 148. 161. *Ray.* 213. 2 *Lev.* 13.

So, if a bishop lets, rendring rent during the term to him, or his successors, in the disjunctive. *R.* 5 *Co.* 111. *b.*

So, if tenant in fee lets, rendring rent generally without saying to whom, it goes to his heir. *Co. L.* 47. *a.* *Per Kingmill*, 21 *H.* 7. 25. *b.* *Per Chlmly*, 27 *H.* 8. 15. *a.* *Dub. per Knightly*, 27 *H.* 8. 16. *a.* *Per two J. Dy.* 45. *a.* *Dub.* 2 *Rol.* 450. *l.* 20.

Or, rendring rent to him or his heirs, in the disjunctive. *Cont. Co. L.* 214. *a.*

Or, to him so much money, and after his death a rose, &c. to his heir. *Co. L.* 213. *b.*

So, a reservation to the heir will be good, without reserving the rent to himself; as, if a man lets for years to commence after his death, rendring rent to his heir. *R.* 2 *Rol.* 447. *l.* 10. *Cont. Co. L.* 99. *b.* 143. *b.* 213. *b.*

So, if tenant in tail lets, rendring rent to his heir, it will be good; for he takes by purchase after the death of the donee. *D.* 2 *Rol.* 447. *l.* 15. *Cont. Co. L.* 99. *b.* *Acc. Hard.* 90.

So, if tenant in tail to him and the heirs male of his father, lets, rendring rent to him, his heirs and assigns, the rent shall go to the heir male of the body of his father, tho' he be not heir to the lessor; for it is incident to the reversion. *R. Hard.* 91. 95.

But if a man lets, rendring rent to himself, without more, it does not go to his heir. *Co. L.* 47. *a.* *Per Moile*, *Lit. cont.* 10 *Ed.* 4. 18. *b.* *Dy.* 45. *a.* 2 *Rol.* 450. *l.* 25.

Or, to him and his assigns. *Co. L.* 47. *a.*

Or, to him, his executors, and assigns, it does not go to the heir or executor, but determines upon the death of the lessor. *R. Ow.* 9. *Cro. El.* 217. 2 *Rol.* 450. *l.* 27. 12 *Co.* 36. *Semb. cont.* 1 *Vent.* 161, 2.

Or, to him and his assigns to have an *heriot*, or 40 *s.* at the election of him, his heirs, or assigns. *R.* 1 *Mod.* 217.

Or, to him and his executors. *Co. L.* 47. *a.*

So, if the reservation be during the term to himself and *B.* and the survivor of them, it does not go to the heir; for the express mention of him and *B.* shews the intent that no other shall have it. *Per three J. Berkley cont. Cro. Car.* 290. And upon error it was compounded. 2 *Rol.* 450. *l.* 50. *Jon.* 309.

Yet on a grant of copyhold, rendring to the lord so much rent *et servitia consueta*, the rent goes to the heir. *R.* 2 *Rol.* 450. *l.* 40.

So, a rent cannot be reserved to a stranger. *Co. L.* 47. 143. *b.* *Lit. f.* 346.

As, if a man reserves rent to himself and his wife, it will be void as to the wife. 2 *Rol.* 447. *l.* 32. *Jon.* 309.

So, if before the statute *W. 2. 13 Ed. 1.* he had made a feoffment to hold of him and his wife. 2 *Rol.* 447. *l.* 45.

So, if he reserves rent to his heir, without saying to him and his heirs. *Co. L.* 213. *b.*

If he reserves rent to him or his heir, it will be good to him for his life, and void to the heir. *Co. L.* 214. *a.*

So, if a man, and *B.* his son, reciting that *B.* is his heir apparent, let for years, to commence after the death of the father, (who was sole seised,) and rendring rent to the said *B.*, it will be void; for a reservation to him by his proper name, and not to him as heir, is the same as if it was to a stranger. *R.* 2 *Rol.* 447. *l.* 20.

Yet the king may make a reservation of a rent to a stranger. 2 *Rol.* 447. *l.* 35. *Semb. Co. L.* 143. *b.*

So, a man may reserve a rent to himself for his life, and a different rent to his heir. *Co. L.* 213. *b.* 214. *a.*

(B 6.) Rent follows the Nature of the Land.

The rent reserved follows the nature of the land; and therefore, if two joint-tenants let by deed-poll, or *parol*, rendring rent to one, it shall go to both. *Co. L.* 47. *a.*

If two joint-tenants let by deed to *A.* rendring to them 10 *s. per ann.* and only one seals the deed, the demise shall be but of a moiety, rendring only 5 *s. per ann.* *R.* 2 *Rol.* 453. *l.* 35.

If a man seised as heir of the part of his mother lets, rendring rent to him and his heirs, it goes to the heir of the part of the mother. *Hard.* 90.

So, if seised of land of the nature of *Borough-English*, it goes to the youngest son. *Hard.* 90.

(B 7.) The Reservation shall be certain.

So, the reservation ought to be certain; for if a man demises at will, rendring *secundum ratam* 18 *l. per ann. quamdiu* the demise continues, it will be void; for it does not appear what rent he shall pay in certain, or at what time. *R.* 4 *Mod.* 79. 1 *Sal.* 262.

So, if the demise be of several houses, rendring 5 *l.* rent, *viz.* for one house 20 *s.*, for another 40 *s.*, and for another 40 *s.*, with a clause for re-entry upon non-payment of the same rent, or any part, it will be an entire rent, and the *viz.* cannot make a severance. 2 *Rol.* 448. *l.* 30. 5 *Co.* 34. *b.* *R. cont. Mo.* 52.

But a lease of three manors, rendring for one 5 *l.*, for another 6 *l.*, for another 10 *l.*, with condition of re-entry for non-payment of any parcel, makes several demises and several rents, for which there shall be several avowries. *Dy.* 309. 2 *Rol.* 448. *l.* 20. 5 *Co.* 55.

If a lease be by a husband, rendring rent to him for life, and to his wife for life, it will be a reservation during the life of the survivor. *R. Mo.* 876.

(B 8.) How the Rent shall be paid.

So, if a man demises for five years, rendring 100 *l.* to be paid by equal portions during the term, it shall be paid yearly, tho' that word was omitted. 2 *Rol.* 449. *l.* 50.

Or,

Or, rendring rent, to be paid at the usual feasts, without saying which, it shall be construed at *Michaelmas* and *Lady-day*. *R. 2 Rol. 450. l. 5.*

Or, to be paid at such feasts, without saying *equally*, it shall be paid equally. *2 Rol. 450. l. 15.*

Or, to be paid at such feasts, without more, it shall be paid yearly during the term. *1 Sid. 116.*

So, upon a lease, rendring rent to be paid quarterly, it shall be paid every quarter, tho' the quarters do not end at the usual feasts. *2 Rol. 450. l. 7.*

(B 9.) At what Time.

So, if a demise be, rendring rent at *Michaelmas*, or so many days after, it shall be paid at the last day, which is the legal time of payment. *R. 10 Co. 127. Vide post. (D 7.)*

So, if the lessor dies before the last day, the heir shall have the rent. *R. Cro. El. 575. 10 Co. 128. b.*

If he grants the reversion to *B.* after *Michaelmas*, before the last day, *B.* shall have the rent. *10 Co. 129. a.*

So, if a bond be to pay an annuity to *B.* for his life, at *Michaelmas* and *Lady-day*, or in thirty days after such feasts, and *B.* dies after *Michaelmas*, and within thirty days; the annuity determines, and there shall be no payment at *Michaelmas*. *R. Cro. El. 380.*

So, if a lease be for fifty years, if the lessor live so long, rendring rent at *Michaelmas*, or thirty days after, and the lessor dies after *Michaelmas* within thirty days; the rent for that payment is discharged by the act of God. *R. 10 Co. 127. 2 Cro. 310.*

If rent be reserved, payable at such a day, and the lessor dies the same day after noon, it shall be paid to the heir, or him in remainder, not to the executor; for it was not due till the last moment of the day. *R. Sal. 578.*

But if the tenant pays the same day before the death of the lessor to him in remainder, the executor shall be aided in equity. *R. Eq. Ca. (2d part of 2 Mod. Ca.) 21.*

So, if the lessee pays to the lessor, or tenders his rent at any time of the day, or at *Michaelmas* before the thirty days after elapse, the lessor ought to accept it. *10 Co. 127. b.*

So, if rent be reserved yearly during the term at *Michaelmas*, or thirty days, and the term ends at *Michaelmas*, it shall then be due before the thirty days, otherwise it would not be paid yearly. *R. 2 Cro. 227. 233. 310. Yel. 167. 1 Bul. 1.*

So, if a demise be of a reversion after a term for years, rendring rent yearly, *cum reversio acciderit*, the rent does not begin till the term expires. *Dy. 377.*

So, if the reservation be of an heriot after the death of the lessee, or of a journey *tempore messis*, without limiting when the reservation commences; the heriot shall not be paid, if the lessee dies before the former term expires; nor shall a journey be performed till the reversion falls into possession. *R. per three J. Keeling cont. 2 Sand. 166.*

[If *A.* tenant for life, subject to forfeiture, remainder over to *B.*, lease to *C.* for a term, and afterwards apprehending that he has forfeited, acquiesce in *B.*'s claiming and receiving the rent from *C.*, his executor may, on shewing that he acquiesced under a false apprehension,

tion, recover from C. the amount of the rent erroneously paid to B. *Williams v. Bartholomew*, C. P. T. 38 Geo. 3. 1 Bos. & Pull. 326.]

(C) The several Kinds of Rent.

(C 1.) Rent-Service.

(C 1.) *What* THERE are three kinds of rent; rent-service, rent-*shall be.*] charge, and rent-seck. *Lit. sect. 213.*

Rent-service is when a tenant holds his lands by rent and fealty, or any other service. *Lit. sect. 122. 213.*

Before the *st. quia emptores terrarum*, 18 Ed. 1. if a man had made a feoffment by deed, or without deed, rendering to him and his heirs a certain rent, this was rent-service. *Lit. sect. 216.*

So, if he had reserved no rent or service; for the feoffee, of course, had held of him by the same services by which he held of the lord paramount. *Ibid.*

But by that statute it was provided *quod feoffatus teneat de domino capitali*, &c. and therefore now not any rent reserved upon the feoffment; but the rent, which the feoffee pays to the lord paramount, is the rent-service. *Lit. sect. 122. 140. 217.*

So, now if a man makes a gift in tail, leases for life, for the life of another, or for years, rendering rent, and reserving the reversion to himself, this is a rent-service; for fealty is a service incident to the reversion. *Lit. sect. 214, 215.*

So, if he makes a gift in tail, without reservation of any rent; for the donee shall hold of the donor in like manner as he holds over. *Co. L. 143. a.*

Otherwise, if he makes a lease for life or years, without a reservation. *Co. L. 143. a.*

So, if the donor or lessor has the reversion, tho' he has not the immediate reversion; as, if he makes a gift or lease rendering rent, remainder to another in tail or for life, the reversion to himself. *Co. L. 142. b.*

So, if the donor or lessor grants his reversion to another, the grantee has the rent as a rent-service; for the rent is incident to the reversion. *Lit. sect. 228.*

(C 2.) *Quit-rent and rent of assise.*] If the rent reserved by the lord of his tenant was reserved for all services, it is called a quit-rent; because the tenant, in respect of it, is quit from other services.

And it may be reserved from a freeholder or copyholder. 2 *Inst.* 19.

And being usually paid in silver, it was called *white rent*, and the rent paid in pepper, cummin, &c. *black rent.* *Ibid.*

And when the rents of freeholders and copyholders are assised, or reduced to a certainty, by the lord of the manor, they are called rents of assise. *Ibid.*

(C 3.) *Fee-farm-rent.*] If upon a feoffment the same rent be reserved, which was paid upon a farm of the same land, or the fourth part of it, it shall be called a fee-farm-rent. 2 *Inst.* 44. *Co. L. 143. b.*

[And a fee-farm-rent does not in itself imply a power of distress; yet, if a clause of distress be added in the deed, by which it is reserved, it is not for that reason the less a fee-farm-rent. *Vide Doug.* 627. *in the notes.*] If

If the king grants land in fee-farm, without any reservation of rent, the yearly rent shall be paid. *Mo.* 168.

If he reserves an express rent, it will be a fee-farm-rent. *Ibid.*

The rent reserved upon a farm by the king was usually paid in provisions for his house, till the time of *H. 1.* when it was changed to money. *Mad.* 186.

So, if the king reserves a pension, or one be granted to him out of land, it will be extinguished by unity of possession, being in the nature of a rent. *Hard.* 388.

If land be granted in fee-farm, reserving the whole rent to a stranger, it will be void. *Mo.* 168.

But part may be to the king, and other part to a stranger. *Mo.* 168.

If a fee-farm-rent be reserved to the king upon condition of re-entry upon non-payment, and the king grants the rent to *A.* in fee; if the rent afterwards be not paid pursuant to the condition, the king shall not re-enter; for his grant to *A.* would be defeated. *R. Cro. El.* 69.

All lands granted in fee-farm are held in *socage*, and not in *chivalry*; for the whole value is presumed to be reserved. *Mo.* 168. *Mad. Form. Int.* 8.

If a rent of so much a year be reserved, but by the same deed the lessor agrees to allow so much at every payment for bringing the rent; this shall not be recouped as a diminution or alteration of the rent; but is a covenant for allowance. *R. 2 Cro.* 34.

(C 4.) *Incidents to rent-service.*] To rent-service distress is incident; for, for every rent-service, a man may distrain of common right. *Co. L.* 142. *a.* *Vide Distress*, (A 1. B 1.)

So, rent-service is incident to the reversion; for if the reversion be granted without saying *cum pertinentiis*, the grantee shall have the rent also. *Co. L.* 143. *a.* 148. *a.*

(C 5.) *What shall not be rent-service.*] But a rent reserved upon a lease at will is not a rent-service, tho' the lessor may distrain for it of common right. *Co. L.* 142. *b.*

So, if a tenancy comes to the king by fine, &c. the rent is not a rent-service, but is distrainable of common right; for it is not the act of the lord, but of the tenant only. *R. 1 And.* 160.

So, if lands, parcel of a chantry, are held by rent and fealty, and upon dissolution, &c. the king grants them, the patentee shall not hold of the first lord, but of the king; yet the rent-service (before due) continues payable as a rent-charge distrainable of common right. *R. 1 And.* 45. *Jen.* 235, 6.

(C 6.) Rent-Charge.

(C 6.) *What shall be. By reservation.*] A rent-charge is when rent is granted out of land which is charged with distress for the same rent; as, if a man, since the *st. quia emptores terrarum*, 18 *Ed.* 1. makes a feoffment by deed, reserving rent to him and his heirs, with a clause of distress. *Co. L.* 143. *b.* *Lit. sect.* 217.

Or, gives in tail, or lets for life or years, remainder in fee. *Lit. sect.* 217.

Be it by any deed, indented, or poll; for the feoffee, by his acceptance, agrees to the rent. *Co. L. 143. b.*

So, if a man grants a reversion or remainder of lands in fee, reserving rent with distress. *Co. L. 144. a.*

Or, conveys lands by bargain and sale, or otherwise, by way of use. *Co. L. 144. a. Vide ante, (B 3.)*

(C 7.) *By prescription.*] So, a man may have a rent-charge by prescription. *Co. L. 144. a.*

(C 8.) *By grant.*] So, if a man grants out of such land a certain rent with a clause of distress. *Lit. f. 218.*

Tho' he adds a proviso, that it shall not charge his land; for that would be repugnant. *Co. L. 146. a.*

So, if a man binds his land to the payment of rent, it will be a rent-charge; tho' there be no express grant of rent. *Co. L. 147. a.*

So, if a man grants by deed, that *A.* may distrain such land for a rent, it will be a rent-charge; for the land is charged with it by way of distress. *Lit. f. 221.*

Or, says that *A.*, if he be not paid so much *per ann.* shall distrain for it in the manor of *D.* *Lit. f. 221.*

So, if he binds his manor with a rent to be distrained by the king's bailiff; for the king's bailiff is named but as a servant to him; and he who can do it by a servant, may do it by himself, or another. *Co. L. 147. a.*

So, if he grants a rent out of *B.* and by the same or another deed grants that he may distrain for it in another land; it is a rent-charge which issues solely out of *B.*, tho' a distress be in other land. *Co. L. 147. a.*

So, if he binds his land and goods upon it to the payment of a rent, it will be a rent-charge, tho' he says nothing of distress. *Ibid.*

So, if he devises a rent, with power to distrain for it at the usual feasts, it will be a rent-charge; tho' no express charge upon any land. *R. Mo. 592.*

Otherwise, if it was by deed; for a clause of distress only is not sufficient to create a rent-charge in a grant. *Mo. 592.*

When the grantee may elect to take it as a rent-charge, or as an annuity. *Vide Annuity, (C 1, &c.)*

If the grant be *de qualibet acra terræ meæ*, a rent of 20 s. where he has twenty acres, the grantee shall have 20 l. *per ann.* *Co. L. 147. b.*

If a bargainor and bargainee of land join in a grant of a rent thereout, before enrolment of the bargain and sale, it shall be the grant of the bargainor, and the confirmation of the bargainee till enrolment, and afterwards the grant of the bargainee, and the confirmation of the bargainor. *Co. L. 147. b.*

If the grant be out of a freehold, and term for years, it issues wholly out of the freehold only, tho' the term is charged with distress. *Co. L. 147. b.*

And if he avows for a distress upon the term, he must plead the grant of rent out of the freehold only. *R. 7 Co. 24. b.*

If the grant be of a rent out of a term to *A.* for life, he must plead the grant during the term, if *A.* lives so long; for he cannot say that he was seised of the rent for life. *Co. L. 147. b. R. 7 Co. 25. a.*

If

If the grant be out of land to *A.* of a rent which he had by the grant of his father, it will be a grant of a new rent; tho' he never had it by the grant of his father. 2 *Rol.* 423. *l. ult.*

So, if a man recites a grant to *A.* of such a rent for life, and afterwards grants the same rent after the death of *A.* to another for life, it will be a good grant to the other, tho' there was not any rent granted to *A.* 2 *Rol.* 424. *l. 10.*

So, if he lets for life, rendring 5 *l. per ann.* and afterwards grants the rent to *B.* for his life, to take out of the same land by the hand of the lessee, or whatsoever hand the land shall come to; *B.* shall have the rent for his life, tho' the lessee dies before him. 2 *Rol.* 424. *l. 5.*

If a grant be of a rent-charge payable at *Lady-day* and *Michaelmas*, as afterwards expressed, and it is not expressed afterwards when it shall commence, the rent commences immediately. *Semb. Jon.* 344.

So, if it be to commence as by deed shall be afterwards expressed, and not otherwise, and he does not make a deed afterwards; *per two J. but per Crooke*, it shall be void. *Jon.* 344.

If it be to commence, as by deed afterwards expressed, and not otherwise, and by a subsequent deed he declares that the rent shall be paid, it shall commence at that time. *R. Jon.* 344.

If after a grant of a rent-charge the grantor conveys his land to the king, remedy does not lie by distress upon the king. *Sav.* 125.

But if the king grants the lands to *A.* the distress is revived, and the grantee may distrain for all the arrears. *Semb. Sav.* 125.

(C 9.) A Rent-Seck.

(C 9.) *What shall be.*] A rent-seck is, when no distress is incident to it; as, if a rent be granted by deed out of land, without a clause of distress. *Lit. sect.* 218. 2 *Rol.* 423. *l. 40.*

Or, if a man, since the *st. Quia emptores*, makes a feoffment by deed, rendring rent without a distress. *Lit. s.* 217.

Or, gives in tail, or for life, remainder in fee, rendring rent, without mention of a distress. *Lit. sect.* 217.

So, if the king grants lands, parcel of the duchy of *Lancaster*, rendring rent, it will be a rent-seck, or in gros; because the tenure is of the king, and the rent is reserved to him in right of the duchy, which makes it a rent in gros. *Mo.* 166.

So, if a man binds his goods and lands in such a sum yearly if such a condition be not performed; after a breach, it will be a rent-seck issuing out of the land, tho' there be no words of grant, or where it shall be taken. 2 *Rol.* 423. *l. 42.*

So, if a rent be granted to *A.* in fee, or for life, with power of distress for so many years, it shall be a rent-seck; for the freehold is *seck*, and the distress is only appurtenant during the years. *Co. L.* 147. *b.*

Or, if it be granted to two and their heirs, with power of distress to one, it shall be a rent-seck for the whole; for it is entire, and cannot be *seck* to one and a rent-charge to the other. *Co. L.* 147. *b.*

Yet their grantee, or the survivor, shall have it as a rent-charge. *Ibid.*

So, a rent out of three acres, with distress to one, is a rent-seck. *Ibid.*

Or, out of one manor, with distress in another. 2 *Rol.* 423. *l. 35.*

Or, out of a mill, *percipiend.* of him and his heirs; for it shall be understood that it shall be paid by him and his heirs out of his mill. 2 *Rol.* 423. *l.* 46.

So, if there be tenant by fealty and rent, and a grantee of the rent, saving the fealty to the lord, the grantee has the rent as *seck.* *Lit. sect.* 225.

So, if the lord grants the fealty, saving to himself the rent, he shall have the rent as *seck.* *Lit. sect.* 226.

So, if a rent-service is reserved, and afterwards the land comes to the lord by the *stat.* of dissolution, or other means, by which the tenure is extinct, saving the rent, it becomes a rent-seck. *R. Jon.* 234, 5.

So, where a rent-service is reserved, and afterwards the land is given to the king, or other lord, by act of parliament, by which the tenure is extinct, tho' there be no saving for the rent, yet it continues as a rent-seck. *Seimb. Jon.* 235.

(D) Remedy for Rent.

(D 1.) By Assise.

IF a rent-service or rent-charge be in arrear, the party has remedy by distress. *Vide Distress*, (A 1, &c. B 1, &c.)

So, every one entitled to an estate of freehold or inheritance, in a rent-service, rent-charge, or rent-seck; if he be disseised of it, may maintain an assise. *Vide Assise*, (B 2, &c.)

What seisin is sufficient for maintaining an assise, or for making a distress, *vide Seisin* (C, D, E).

(D 2.) *What shall be a disseisin of it.*] If a man obstructs the means by which a rent may be obtained, it will be a disseisin of the rent. *Co. L.* 160. *b.*

As, it will be a disseisin of a rent-service or rent-charge, if the terre-tenant, or any other, resist, and will not suffer a distress for rent in arrear, by him who has right. *Co. L.* 160. *b.*

Or, makes an inclosure, by which he cannot come to distrain. *Lit. sect.* 237, 238.

So, if he makes *rescous*, after a distress taken. *Ibid.*

If a stranger makes *rescous* in his name. 1 *Rol.* 658. *l.* 35.

Or, makes replevin by writ or plaint. *Lit. sect.* 237, 238.

Or, counterpleads the title of the plaintiff for delay. *Co. L.* 160. *b.* 161. *a.*

If he vouches a record, and fails. *Co. L.* 160. *b.*

So, if he forestalls, or obstructs the lord, &c. when he is going to the land to make a distress; with force or menace of life or member. *Lit. sect.* 240.

So, it will be a disseisin of a rent-seck or rent-charge, if the terre-tenant makes denial of rent in arrear, upon lawful demand upon the land. *Lit. sect.* 233, 238, 239.

Tho' the terre-tenant be absent from the land at the time of the demand; for that is a denial in law. *Co. L.* 153. *b.*

So, tho' the demand be but of one terre-tenant, it will be a denial by all. 1 *Rol.* 658. *l.* 27.

If

If by word of mouth he directs the tenant not to pay. *Ray. 371.*

If he does not pay upon distress; for that is a denial in law. *1 Rol. 658. l. 15. 20.*

So, inclosure or forestalment, &c. from coming to the land to make a demand, will be a disseisin of a rent-seck. *Co. L. 161. b.*

So, if the tenant pays his rent to another lord by coercion of distress, it will be a disseisin, if the lord pleases. *Co. L. 323.*

But payment of rent to another by coercion will not be a disseisin, but at the election of the lord. *Co. L. 323.*

So, denial of rent by him who is not terre-tenant, will not be a disseisin. *R. Jon. 414.*

Or, if the refusal does not appear to be upon demand upon the land. *Per three J. Cro. cont.* for there being a refusal, a demand shall be intended. *Jon. 414.*

So, a rescous, replevin, inclosure, denial, &c. will not be a disseisin before actual seisin of the rent. *Co. L. 161. a. Vide Seisin, (F 1, &c.)*

When a rent shall be apportioned, suspended, or extinguished, *vide Suspension.*

(D 3.) Debt, Distress, or Re-entry.

When there shall be remedy for it by debt or distress, *vide Debt, (A 5. 7.)—Distress, (A 1, &c.)*

[By *stat. 4 Geo. 2. c. 28. s. 1.* those who hold over lands after the expiration of their leases or terms, shall pay double the yearly value, to be recovered in any of his Majesty's courts of record by action of debt; and there shall be no relief in equity against the recovery of this penalty.]

[But acceptance of single rent is a waiver of the double rent. *Cowp. 245. 5 Burr. 2698. Dougl. 175. 1 T. R. 53.*]

[And by the same statute, *s. 2.* as often as half-a-year's rent is in arrear, the landlord, if he has right of re-entry for the non-payment, may, without formal demand or re-entry, serve a declaration in ejectment for the recovery of the demised premises, and recover judgment to hold them discharged of the lease; provided, that the right of any mortgagee of such lease shall not be barred, if within six months he pay all rent in arrear, and all costs and damages.]

[And provided, that if at any time before the trial of the ejectment, the tenant or his assignee shall pay or tender to the lessor, &c. all the rent in arrear, together with costs, all further proceedings shall be stayed. *s. 4.*]

If an estate be upon condition that he pay the rent, how remedy shall be by re-entry for the condition broken, *vide Condition, (O 3, &c.)*

[By *stat. 11 G. 2. c. 19. s. 14.* where the demise is not by deed, the landlord shall recover a reasonable satisfaction, in an action on the case, for use and occupation; and if in evidence on the trial of such action, any parol demise, or any agreement, not being by deed, on which a certain rent was reserved, shall appear, the plaintiff shall not be nonsuited, but it shall be evidence of the quantum of the damages.]

[Tenant by parol demise from year to year, is within *11 G. 2. c. 19.* and subject to pay double rent, if he does not quit after having given notice. *Timmins v. Rawlinson, H. 5 G. 3. 3 B. M. 1603.*]

[A tenant from year to year of an house at a yearly rent, becomes a bankrupt in the middle of the year, and his assignees enter and keep possession for the remainder of the year; the lessor cannot maintain an action for use and occupation against the assignees, for the bankrupt's occupation as well as their own, without proving *their special instance and request* for the bankrupt to occupy, during the time that elapsed before the bankruptcy. *Naisb v. Tallow, C. P. T. 34 Geo. 3. 2 H. Bl. 319.*]

[An action for use and occupation may be maintained by a grantee of an annuity after a recovery in ejectment against a tenant, who was in possession under a demise from year to year for all rent in his hands at the time of notice by the grantee, and down to the day of the demise in the ejectment, but not afterwards. *Birch v. Wright, B. R. M. 27 Geo. 3. 1 T. R. 378.*]

[By s. 18. tenants holding the premises, after they shall have given notice to quit, shall pay double rent.]

[If tenant gives parol notice that he will quit, it is sufficient, and subjects him to double rent if he does not. *3 B. M. 1603.*]

[As to the remedy where goods are carried off the premises fraudulently, *vide* s. 11 G. 2. c. 19.]

(D 3.) *Demand, when necessary.*] But in all cases of a subject, where an estate is upon condition to be void for non-payment of rent, the condition will not be broken, if the rent be not demanded. *Co. L. 201. b. R. 2 Cro. 145.*

Tho' it appears that the party was not ready to pay, if a demand had been made. *1 Rol. 458. l. 17. 22.*

Tho' the condition be upon a lease for years. *R. Hob. 331. R. Jon. 9.*

Or, upon a lease of tythes, or other incorporeal inheritance. *R. Mo. 408.*

So, if there be a lease, and a *nomine pœne* for non-payment of the rent, the rent must be demanded before he is entitled to the *nomine pœne*. *1 Rol. 459. l. 25. D. 7 Co. 28. b. R. Hob. 82. 133. Pal. 208.*

So, if there be a covenant or bond for payment of a sum in gross, if the rent be not paid. *Per two J. one cont. 1 Rol. 460. l. 5.*

So, upon a bond to perform all covenants, payments, &c. in such an indenture, he cannot assign a breach for non-payment of rent reserved by the indenture, if he does not shew a demand of the rent, except where the defendant pleads performance. *R. 1 Rol. 460. l. 20. Adm. Cro. El. 829. Cro. Car. 77.*

So, tho' the bond be expressly to pay the rent, according to the tenor of the indenture. *R. 1 Rol. 460. l. 50.*

Or, to pay the rent, if it be demanded. *R. 1 Rol. 460. l. 45.*

So, if the king makes a lease, upon condition to be void for non-payment of rent, and afterwards grants the reversion, the patentee shall not avoid the lease, without a demand of the rent. *R. 4 Co. 73. a. Mo. 205. 3 Co. 56. a.*

So, the king himself cannot avoid it without a demand, if the condition be express for non-payment upon demand. *Dub. Mo. 210.*

(D 4.) *When not.*] But if the king makes a lease, upon condition to

to be void for non-payment of rent, generally, a demand is not necessary. *R. 4 Co. 73. a. Mo. 205. 5 Co. 56. a. 1 Leo. 2.*

So, it is not necessary in the case of a subject, if the condition be express, that it shall be void for non-payment without demand. *1 Rol. 459. l. 32. D. 5 Co. 40. b. Dal. 4.*

So, debt lies for rent without a demand. *R. 2 Rol. 427. l. 30.*

Or, distress; for the distress itself is a sufficient demand. *R. Mo. 883.*

[A terre-tenant, holding under two tenants in common, cannot pay the whole rent to one after notice from the other not to pay it; and if he does, the other tenant in common may distrain for his share. *Harrison v. Barnsby, B. R. E. 33 Geo. 3. 5 T. R. 246.*]

So, covenant, where the covenant is express to pay such rent. *R. 1 Rol. 459. l. 45. 52.*

And debt upon a bond to pay such a rent. *R. Hob. 8.*

So, in debt upon a bond to perform covenants in an indenture, if the defendant pleads performance, the plaintiff may assign a breach for non-payment of the rent, without showing a demand; for if the defendant rejoins, that it was not demanded, it will be a departure. *R. Cro. El. 829. 1 Rol. 460. l. 30. R. Cro. Car. 76. Hut. 90. R. Hob. 8.*

So, if a lease be, that upon non-payment of the rent at such a feast, there shall be a *nomine pœna* of 40*s.* for every day that the rent shall be in arrear; one demand is sufficient to entitle to the *nomine pœna* for every day. *R. Pal. 208.*

(D 5.) *How it shall be made.*] The demand must be of the precise rent due; for, if he demands a penny more or less, it will be ill. *R. 1 Leo. 305.*

So, he ought to express when it was due. *R. Cro. L. 209. 1 Leo. 305.*

Tho' the jury finds that nothing more is due than was demanded, it does not help, if the demand did not express at what time due. *R. Cro. El. 209.*

So, if the rent be 7*l.* per ann. and 3*l.* more was in arrear, if he demands 10*l.* in an entire sum, it is ill. *Per Rol. Al. 94.*

But a demand by attorney is good.

Tho' he does not shew his name or authority. *D. 3 Leo. 224.*

(D 6.) *At what place.*] So, the demand must be made at the place where the rent is payable, if any place is appointed by the parties, tho' it be not upon the land. *Co. L. 202. a.*

If it be payable at one place or another, it ought to be demanded at both. *Per two J. 2 Rol. 428. l. 36.*

If payable at or in the church of *B.* it ought to be within and without the church. *2 Rol. 428. l. 40.*

If payable to the bishop at *Exeter*, it ought to be at his palace there. *R. 1 And. 27. 3 Leo. 4.*

If no place of payment is expressed, the demand must be upon the land. *Co. L. 201. b. R. Yelv. 37.*

And at the most notorious place upon the land; as, if there be a house there, it must be at the fore-door of the house. *Co. L. 201. b.*

If it be issuing out of a wood, it ought to be at the gate, or most common way through the wood. *Co. L. 202. a.*

If there be several places equally notorious, he, who demands, has election, at which he will make the demand. *Ibid.*

If rent be reserved by the king at the *Exchequer*, his patentee must demand it upon the land. *Co. L. 201. b. Sav. 131.*

But if the king does not express a place of payment, it ought to be paid to him at the *Exchequer*, without other demand. *Co. L. 201. b.*

If the demand be at the most notorious place, it is sufficient, tho' there be no one present. *Ibid.*

Tho' a person be in the house, it is not necessary to go in. *Ibid.*

Tho' he be ready to pay at another part of the house, land, &c. *Co. L. 202. a.*

So, a demand at a place not the most notorious, will be no demand, if it be traversed. *Ibid.*

As, if a demand be at a wood, where land was also demised, *Poph. 58.*

If in a pit, or among bushes, or in a common way upon the land. *Poph. 58.*

If at a barn, when the lessee is in another barn demised. *Ibid.*

Yet, if the party tenders his rent to the lessor, &c. it will be well, tho' it was not in the most notorious place. *Co. L. 202. a. R. 5 Co. 114.*

(D 7.) *At what time.*] So, the demand must be continued by a space sufficient for receipt of the money before the setting of the sun upon the last day appointed for payment. *Co. L. 202. a.*

If issue be, whether he continued half an hour before the setting, and it is found that he continued only a quarter, it is sufficient, if that space was sufficient for counting the money; for this only is material. *R. Cro. El. 209. 1 Leo. 305. Lut. 1139.*

If payment be at *Michaelmas*, or twenty days after, the demand ought to be upon the last of the twenty days; for a demand at the feast is not sufficient. *Co. L. 202. a. R. Pl. Com. 172. b. Semb. Dy. 142. a. R. 10 Co. 127. 129. a. 1 Leo. 142. Lut. 1139.*

If a reservation be of *20l. per ann.* when demanded, the demand must be upon the last day of the year. *Poph. 37.*

If a reservation be at such a day, between four and six *post meridiem*, a demand at five till six is sufficient, tho' he was not there at four o'clock. *Cro. El. 15.*

But a demand for distress may be at any time, where it is said, that if it be not paid upon demand, he may distrain. *Co. L. 202. a. 144. a.*

So, where payment is at *Michaelmas*, or twenty days after, a tender at *Michaelmas* prevents a breach of the condition. *R. 10 Co. 129. a.*

Or, at any time within the twenty days. *2 Leo. 130.*

Tho' he pays to a servant, who tenders the money to the lessor before the days elapsed. *R. 2 Leo. 131. Cro. El. 48.*

So, if a reservation be at *Michaelmas*, or so many days after, and a covenant to pay at *Michaelmas*, covenant lies, if it be not paid at the feast. *R. 1 Rol. 431. l. 35.*

Or, if the reservation be at *Michaelmas*, and if it be not paid at *Michaelmas*, or within forty days after, that the lessor shall re-enter; the lessor may have debt, or distrain for the rent, tho' the forty days be not expired. *2 Leo. 131.* (D 8.)

(D 8.) By Payment of the Sheriff upon an Execution.

By the *st. 8 An. 14.* no goods, on any messuage or lands, &c. leased for life, years, at will, or otherwise, shall be taken by virtue of any execution, unless the party at whose suit execution is sued, before removal of the goods by such execution or extent, pay to the landlord the arrears of rent, not exceeding a year's rent, due at the time of the execution.

And the sheriff is empowered to levy the money paid for rent, and the execution money.

And if the sheriff, upon demand of the rent, removes the goods taken in execution, before payment of the rent, an action lies against him.

So, upon motion, the court will direct the sheriff to pay the rent before the execution is completed.

[On an execution for costs on judgment of nonsuit, sheriff cannot, after he has received notice of rent due, remove the goods before he has satisfied landlord one year's rent; unless rent paid, sheriff must quit; if he does not, action lies against him; or, on motion, the court will order restitution to the amount of the goods sold, deducting costs incurred before notice. *Henchett v. Kempson*, P. 2 G. 3. 2 Wils. 140.]

[A bill of sale is a removal of goods taken by *feri facias*, and the sheriff shall pay the year's rent out of the money levied. *Barnes*, 211.]

[On an outlawry, *cap. utlagat.* and goods seized by process still remaining in the sheriff's hands, landlord shall have a year's rent. *Greaves v. D'Acastro*, P. 1725, *Bunb.* 194.]

[The landlord is to have his year's rent without any deduction. *Gore v. Goston*, M. 12 Ge. Str. 643.]

[An executor has the same benefit of the act as the landlord, for it is an interest vested. *Chace v. Chace*, H. 2 Geo. 2. Fort. 359.]

But by a proviso in the *st. 8 An. 14.* it shall not hinder the queen in the levying or seizing any debts, fines, penalties, or forfeitures answerable to her majesty; but the queen may levy, &c. them in such manner as if the act had not been made.

[An extent against the king's debtor, teste'd after the distress, takes place of the distress actually made, before sale, but not after. *Rex v. Cotton*, T. 24 & 25 Geo. 2. *Parker*, 112.]

[If goods are seized on an extent on an outlawry, the landlord shall not have the goods delivered to him, tho' he distrained before the extent. *Rex v. Southerly*, P. 1716, in *Scacc. Bunb.* 5.]

[If extent issues against a tenant, and afterwards, but before the extent is executed, the landlord distrains, and the inquisition finds the goods distrained to be in the possession of the tenant, the landlord shall not have the benefit of the *stat. 8 Ann.* *Rex v. Pritchard*, T. 1729, *Bunb.* 269.]

[When there are two executions, the landlord shall not have a year's rent on each. *Dod v. Saxby*, M. 9 Geo. 2. Str. 1024.]

[The ground landlord of a house is not entitled to a year's rent on an execution against an under-lessee. *Bennet's case*, M. 1 Geo. 2. Str. 787.]

[A. lets land to B. at 75*l.* per annum for one year; a few days before the end B. says he can hold it no longer, but desires as much as

will feed sixteen cows, which *A.* complies with, and demises also the house and garden; some months after, *B.*'s goods are taken in execution, no part of the rent of 75*l.* being paid; *A.* shall not have the 75*l.* on motion, and *semb.* no rent under the act, tho' he proceed by action. *Cook v. Cook*, P. 11 Geo. Andr. 217.]

[If the money be levied by sale of goods taken in execution against defendant, who was a tenant owing rent, after the landlord's death intestate, and before administration granted, the court will not order the sheriff to pay the year's rent to the administrator afterwards. *Waring v. Dewberry*, T. 4 Geo. Str. 97.]

[A landlord is obliged to demand the arrears before the removal of the goods, or it is too late. *Waring v. Dewberry*, T. 4 Geo. Str. 97. Fort. 360. *Darling v. Hill*, P. 9 Geo. 2. B. R. H. 255.]

Vide more concerning *Rent*, in *Chancery*, (4 N 1, &c.)—*Copyhold*, (K 10, 11.)—*Dett*, (A 5. 7.)—*Forcible Entry*, (D 9.)—*Parceners*, (C 8.)—*Pleader*, (2 K 15. 19.—3 M 25.)

Avowry for Rent.

Vide Temps, (G 14.)

Rent of Assise.

Vide Rent, (C 2.)

Rent-Charge.

Vide Distress, (B 2.)—*Pleader*, (3 K 18.)—*Rent*, (C 6.)

Fee-Farm-Rent.

Vide Rent, (C 3.)

Quit-Rent.

Vide Rent, (C 2.)

Rent-Seck.

Vide Rent, (C 9.)

Rent-Service.

Vide Distress, (B 1.)—*Rent*, (C 1, &c.)

R E P A I R S.

Vide Esglise, (G 2.)—*Pleader*, (3 O 11.)

Reparavit.

Vide Pleader, (3 O 15.)

Reparare non potuit:

Vide Pleader, (3 O 17.)

REPEAL.

Vide Patent, (F 1, &c.)

Repeal of a Statute.

Vide Parliament, (R 9.)

REPLEADER.

Vide Pleader, (R 18.)

REPLEVIN.

(A) For what Things it lies.

A Replevin lies, when cattle or goods are distrained and impounded, and thereby the sheriff is commanded, upon pledges, to deliver them to the owner. *Co. L. 145. b.*

And replevin may be made by writ, or by plaint; by writ, at the common law; by plaint, upon the *ft. Marl.* *Co. L. 145. b. Vide Pleader, (3 K 1, &c.)*

Replevin lies of all goods and chattels unlawfully taken.

Whether they be live cattle, or dead chattels. *F. N. B. 68. D.*

Replevin lies *pro examine apium.* *Ibid.*

For iron of his mill. *Ibid.*

So, if cattle, after the taking, return to the owner, he may have replevin for the wrongful taking. *F. N. B. 69. H.*

So, if cattle are taken *damage-feasant*, and detained after sufficient amends, he may have replevin for the wrongful detainer. *F. N. B. 69. G.*

So, if a cow, &c. distrained, has a calf, &c. replevin lies of the calf, &c. *F. N. B. 69. D. Dal. 65.*

So, if the *mesne* puts his cattle in the place of the cattle of the tenant *peravail*, as he may, he may have replevin for them, tho' they never were distrained. *Co. L. 145. b. 7 H. 4. 18. a.*

So, replevin lies, tho' there be an express grant that the party may distrain and hold the goods against pledges, till the rent be paid; for goods cannot by grant be made irreplevisable. *Co. L. 145. b.*

[Whether goods taken under a warrant of distress granted by commissioners of sewers may not be replevied while in the hands of the officer? *Qu. Pritchard v. Stephens, B. R. H. 36 Geo. 3. 6 T. R. 522.*]

[Whether they may not be replevied by the sheriff or his deputy? *Qu. Ibid.*]

[If they be actually replevied, and the proceedings in replevin be removed into *B. R.* this court will not quash the proceedings in a summary way, but will leave it to the defendant in replevin to put his objection on the record. *Ibid.*]

(B) By whom it lies.

HE who brings a replevin ought to have the property of the cattle or goods in him. *Co. L. 145. b.* But

But a special property is sufficient. *Co. L. 145. b.*

As, if goods be in his custody as a pledge, or for the manuring of his land. *Ibid.*

So, a lord may have a replevin for the goods of his *villein*; for his action of replevin amounts to a claim, and vests the property in him. *Co. L. 145. b. F. N. B. 69. F.*

A husband, for the goods of his wife, taken *dum sola*. *F. N. B. 69. K.*

An executor or administrator, for the goods of his testator. *1 Sid. 81.*

But if goods are taken out of the custody of a *villein* by a trespassor, the lord cannot have replevin; for the *villein* had but a right to the goods. *Co. L. 145. b.*

(C) Against whom.

REPLEVIN lies against him who takes the goods.

And also against him who commands the taking, as well as trespass. *R. 2 Rol. 431. l. 5.*

Or, against both together. *Ibid.*

So, it lies against him who takes *damage-feasant*, if he detains after amends tendred. *F. N. B. 69. G.*

But if there be a dispute upon the seizure of cattle in a highway, upon which application is made to *A.* a stranger, who permits *B.* (upon security given to him to return the cattle to him who has right) to depasture the cattle in the mean time till the contest is determined, and thereupon the servants of *A.* seize the cattle for the use of their master; replevin does not lie against *A.*, but he may plead *non cepit*. *R. 1 Leo. 42.*

So, if he stays the cattle, passing thro' his manor, till the contest determined. *Godb. 113.*

So, replevin does not lie against him who takes goods beyond sea, tho' he afterwards imports the goods hither. *Per Pol. Sho. 91.*

(D) When a Replevin does not lie,

BUT a replevin does not lie for goods taken in execution.

Nor, for goods seized for a debt to the king, without command of the king, or of the barons of the *Exchequer*. *Mad. 672. Et quia averia capta pro debitis nostris non sunt replegiabilia nisi praeceptum nostrum vel baron. nostr. in Scaccario nostro, ideo averia capta de hominibus epis. Lond. in Wydernam. deliberari facias, &c.*

But a replevin lies against the king, if goods be in his hands. *Per Hide, to the Lords, 3 Rusb. 1361.*

So, a replevin does not lie for goods seized by warrant of a justice of peace, upon a conviction for destruction of the game, &c. *Semb. 2 Mod. Ca. 208, 9.*

[Not for goods distrained on a conviction (for deer-stealing). *Rex v. Monkhouse, P. 16 Geo. 2. Str. 1184.*]

[And if the under-sheriff grants it, an attachment shall go against him. *Ibid.*]

[Nor, for goods distrained for a fine imposed on an officer by commissioners of land-tax; and if he takes out replevin, it is a contempt, and an attachment will be granted. *Rex v. Oliver, T. 1717, Bunb. 14.*]

So,

So, a replevin by writ ought not to be made before pledges found to the sheriff. *Vide Pleader*, (3 K 5.)

[On a *scire facias* against a sheriff for not taking pledges, he must plead *ad idem*, *Hayn v. Bigg*, *Fort.* 331.]

So, the sheriff usually takes a bond.

And if upon such bond the party in replevin does not enter his plaint in the county-court, the bond will be forfeited.

So, if afterwards he does not proceed in the prosecution.

Or, if he be nonsuit, or has a verdict against him. *Carth.* 519.

[And now by *st.* 11 *Geo.* 2. *c.* 19. *f.* 23. sheriffs and other officers, having authority to grant replevins, are to take a replevin-bond, in every replevin in a distress for rent, from the plaintiff, and two responsible persons as sureties, in double the value of the goods distrained, conditioned for prosecuting the suit with effect and without delay; and this bond may be assigned by indorsement to the avowant, who may sue on it in his own name.]

[A defendant in replevin is entitled to an assignment of the replevin-bond, if the plaintiff does not appear in the county-court, and prosecute the suit according to the condition, notwithstanding the defendant has neither avowed, or made consuance, he being deprived of the opportunity of so doing, by the plaintiff's neglecting to prosecute the suit. *Dias v. Freeman*, *B. R. E.* 33 *Geo.* 3. 5 *T. R.* 195.]

[A defendant may sue on the bond as assignee of the sheriff in the superior courts, tho' the replevin has not been removed out of the county-court. *Ibid.*]

[It not appearing in a declaration by the assignee of a replevin-bond that the plaintiff was the avowant or person making cognizance, the court of themselves referred to the replevin-suit, it being of record in the court, and the declaration concluding *prout patet per recordum*, &c. *Barker v. Horton*, *C. P. E.* 17 *Geo.* 2. *Willes*, 460.]

[But if the sheriff, &c. omit to take such a bond, an attachment will not be granted against him; the remedy is by action against the sheriff, &c. *Twells v. Colville*, *C. P. M.* 16 *Geo.* 2. *Willes*, 375. 2 *Term Rep.* 617.]

[An action will lie against the sheriff for taking insufficient pledges, and that without any previous *scire facias* against the pledges. *Pattinson v. Prowse*, *H.* 13 *Geo.* 2. *Bull. N. P.* 60. 16 *Vin. Abr.* 400.]

[In such an action the plaintiff cannot recover damages beyond the value of the distress. *Yea v. Cuthbridge*, *B. R. M.* 32 *Geo.* 3. 4 *Term Rep.* 433.—*Concanon v. Lethbridge*, *C. P. E.* 32 *Geo.* 3. 2 *H. Bl.* 36. *contra*; the court having decided that the plaintiff could recover damages beyond the penalty of the bond, *i. e.* for more than double the value of the goods distrained.]

[In such an action he is liable in damages to the extent of double the value of the goods distrained, but no farther. *Evans v. Brander*, *C. P. T.* 35 *Geo.* 3. 2 *H. Bl.* 547.]

[Some evidence must be given in this action by the plaintiff of the insufficiency of the pledges; but very slight evidence is sufficient to throw the proof on the sheriff; for the sureties are known to him, and he is to take care that they are sufficient. *Saunders v. Darling*, *C. P. T.* 10 *Geo.* 3. *Bull. Ni. Pri.* 60.]

[This action ought to be brought by the person making cognizance where there is no avowant on the record. *Page v. Eamer*, *C. P. H.* 39 *Geo.* 3. 1 *Bos. & Pull. Rep.* 378.] But

REPLEVIN.

But if the plaintiff in replevin enters his plaint, and afterwards is restrained by an injunction out of *Chancery* till his death, whereby his plaint abates, the bond will not be forfeited. *R. Carth. 519.*

[In debt on a replevin-bond, it is a bad plea, that defendant appeared at the county-court; he must follow it, wherever removed, to the end of the cause. *Anon. Fort. 209. Nicols v. Newman, P. 3 G. 2. Fort. 361.*]

[In debt on replevin-bond, that he had performed all conditions, is a bad plea; he should plead, he did indemnify. *Lutwydg v. Jameson, M. 4 Geo. 2. C. B. Fort. 210.*]

[If debt is brought on a replevin-bond for not prosecuting in county-court with effect, and defendant pleads he did then and there prosecute with effect, and plaintiff replies, he (present defendant) removed it by *recordari* into C. B. and was there nonsuited, the replication is well. *Vaughan v. Norris, T. 8 Geo. 2. B. R. H. 137.*]

Vide more concerning *Replevin in County*, (C 7.)—*Pleader*, (3 K 1, &c.)—*Viscount*, (B 3.)

Homine Replegiando.

Vide Imprisonment, (L 4.)

REPLICATION.

Vide Action upon the Case upon Assumpsit, (H 7.)—*Arbitrament*, (I 5, 6.)—*Affise*, (B 16, &c.)—*Chancery* (N.)—*Information*, (D 6.)—*Parliament*, (L 24.)—*Pleader*, (C 40.—E 37.—F 1, &c.—M 3.—2 E 4.—2 L 4.—2 W 19, 20, 22, 23, 25.—3 Y 6, 8, 9, 10, 11, 13, 14.—3 I 10.—3 K 24, 25.)—*Prerogative*, (D 75.)

Double Replication.

Vide Pleader, (F 16.)

REPORT.

Masters Report.

Vide Chancery, (W 2, 3.)

REPRISALS.

Vide Prerogative, (B 4.)

REPUGNANCY.

Vide Abatement, (H 6.)—*Condition*, (D 4, &c.)—*Fait*, (E 10.)—*Pleader*, (S 23.)

REQUEST.

Vide Condition, (L 10, 11.)—*Pleader*, (C 69, &c.)

RESCOUS.

(A) When it lies.

WHEN *rescous* lies, or not, upon a distress, *vide Distress*, (D 3, &c.)

Rescous lies not only upon a rescous of a distress for rent-service, *damage-feasant*, debt, or tax due to the king, (of which, *vide in Distress*, (D 5.)) but also when a person arrested by process out of a court of the king, or other lord, is rescued. *F. N. B.* 101, 102. *Reg.* 117, 118.

So, if a person be rescued, who is taken upon hue and cry, or other contempt. *F. N. B.* 102. *Reg.* 117, 118.

Rescous is, when a man lawfully arrested, or taken, is set at large wrongfully. *Co. L.* 160. b.

And lies tho' the process be erroneous; as, if a *capias* goes before an original. *R. Dal.* 1.

So, it will be a *rescous*, if a stranger, of his own head, takes goods distrained by another; tho' the distress was wrongful. *1 Rol.* 673. l. 45.

If *A.* rescues his own goods, for which there was no cause of distress, and also the goods of a stranger, for which it does not appear whether there was cause of distress or not. *R. 2 Cro.* 568.

(B) When not.

BUT it cannot be a *rescous*, where the man set at large never was in custody; for if the sheriff, &c. be hindered from making an arrest, an action upon the case lies, but not *rescous*. *F. N. B.* 102. *F.*

So, an action does not lie for a rescue, where there was no cause of taking; as, if the *rescous* be of a distress made for rent, where no rent was due. *Co. L.* 160. b. *Vide Distress*, (D 5. 9.)

Or, if the rent was tendred before the distress made. *Co. L.* 160. b.

Or, the distress was made in the highway. *Co. L.* 160. b.

Or, of goods not distrainable by law. *Co. L.* 161. a.

So, if a man takes the goods of *B.* and *C.* for a distress, together, where there was no cause for a distress; an action does not lie, tho' *B.* rescues the whole. *1 Rol.* 673. l. 47.

Or, the goods of his tenant and a stranger for a distress for rent, where no rent is due; an action does not lie, tho' the stranger rescues the goods of both. *Qu. F. N. B.* 102. *E.*

(C) By whom it lies.

IF a rescue be made of a distress made by a bailiff, or servant of another, the master shall have *rescous*; and not the servant. *F. N. B.* 101. *F.*

So, if a man taken in execution be rescued, the plaintiff shall have an action, and not the bailiff who arrested him. *Qu. F. N. B.* 102. *C. Reg.* 118. a. b. *R. per three J. two cont. Hutt.* 98. *Cro. Car.* 109.

So, the lord of a franchise, or liberty, shall have an action for a *rescous* done to his bailiff. *F. N. B.* 101. *H.* 102. *B.*

But, if the king's bailiff, or collector, arrests, or distrains for a duty to the king, he shall have an action *qui tam*; for the king cannot have it. *F. N. B.* 101. *G. H.* 102. *A. B. G.*

So,

So, if a bailiff of a sheriff distrains for the wages of a knight for parliament, and *rescous* is made, he shall have an action, for the knight cannot have it; because it is not a duty from any certain person. *F. N. B.* 102. *D.*

So, a bailiff of a franchise.

(D) Remedy for a Rescous.

(D 1.) By Writ of *Rescous*.

IF a man rescues goods distrained, or a person arrested by another, he may have a writ of *rescous*, *quare cum ipse bona, &c. distraxisset, & eadem imparcare voluisset*, *D. vi & armis rescussit*. *F. N. B.* 101.

And he may join an assault upon his servant in the same writ. *F. N. B.* 102. *D.*

[Writ of *rescous* may contain also a continuance against the defendant. *Barnes*, 429.]

(D 2.) By Action upon the Case.

So, if a person arrested upon *mesne* process be rescued, an action upon the case lies against the rescuers, by the plaintiff in the suit; for he has the loss, and no remedy against the sheriff. *R.* 2 *Cro.* 485, 6. 3 *Bul.* 200.

So, it lies by the plaintiff against the rescuers, if the rescue be after an arrest upon a judicial process; for it is reasonable that the plaintiff should have his election to sue the rescuers, or the sheriff; for perhaps the sheriff is dead or insolvent. *R.* per three *J.* two cont. *Cro. Car.* 109. *Hut.* 98.

And he may declare according to the truth of his case; as, that the rescue was from the sheriff's deputy. *R.* 2 *Cro.* 242.

[In case for rescuing a debtor taken upon *mesne* process sued out of the Palace-court, it was holden not to be sufficient ground for arresting the judgment after verdict, that it was not alleged that the cause of action in the inferior court arose within the jurisdiction, or that it was not alleged that the party below did not appear at the return of the writ. *Bentley v. Dannelly*, *B. R. H.* 39 *Geo.* 3. 8 *T. R.* 127.]

So, by the *st.* 2 *W. & M.* *ss.* 1. *ch.* 5. *sec.* 4. upon pound-breach, or *rescous* of goods distrained for rent, the person grieved may, by action on the case, recover treble damages and costs against the offenders, or any of them, or the owner of the goods, if found to have come to his use, or possession. *Vide Distress*, (D 4.)—*Pleader*, (2 *S.* 29.)

But if the defendant be rescued upon *mesne* process, and the sheriff returns the *rescous*, an action upon the case does not lie against the sheriff. *R.* 3 *Bul.* 200. 2 *Cro.* 419. 486. *Vide Escape* (D).

(D 3.) By Indictment.

So, if a *rescous* be made upon a distress, &c. for the king, an indictment lies against the rescuer. *F. N. B.* 102. *G.*

An indictment for a *rescous* will be good, tho' it does not say *vi & armis*; for *rescussit* imports it. *R.* 2 *Bul.* 208. 2 *Cro.* 345. 473.

Tho' it does not say in what place the *rescous* was, for it shall be intended where the arrest was made. *R.* 2 *Bul.* 208. 2 *Cro.* 345.

If

If it says, that by virtue of a plaint before the sheriff, he was lawfully arrested, it is sufficient, without saying, that it was by warrant; for a good warrant shall be intended, if he was lawfully arrested. *R. 2 Cro. 473.*

[In an indictment for a rescue from the house of correction, it must appear for what the prisoner was committed there. *Rex v. Freeman, P. 18 G. 2. Str. 1226.*]

(D 4.) By Return of *Rescous*.

So, if a *rescous* be made upon *mesne* process, the sheriff may return, that the defendant was arrested, and *seipsum rescussit & non est inventus*, &c. *Kit. 260. b. R. 2 Cro. 419. Dub. 1 Jon. 201.*

Or, *quod ipse et alii, &c. rescusserunt. Kit. 261. a.*

So, the sheriff may return *mandavi ballivo*, who returned a *rescous*. *R. 2 Rol. 457. l. 7. 10.*

And in *B. R. mandavi ballivo itineranti*, who answered that he was rescued. *R. 2 Rol. 457. l. 5.*

But it is not good in *C. B.* for a *rescous* from the bailiff is a *rescous* from the sheriff, and ought to be returned as such. *2 Rol. 456. l. 50. R. Dy. 241. a.*

So, upon a *feri facias*, a *rescous* cannot be returned. *R. Sho. 180.*

(D 5.) *How it shall be returned.*] The return of a *rescous* ought to be certain; and therefore, if it does not shew that he was in his custody, it will be insufficient.

So, if it does not shew where he was arrested; for perhaps it was out of the county. *R. Yel. 51. Mo. 422.*

If it says, that a bailiff arrested, and he was in custody of the sheriff, and rescued out of the custody of his bailiff, it is repugnant. *R. Sal. 586.*

If it says, his father rescued *A.* such a day, and *A.* rescued himself, without saying at what time, it is bad. *R. 2 Bul. 137.*

If he makes the return of a bailiff of a franchise, he ought to shew that he had *retorn. brevium. Cro. El. 781.*

And that the *rescous* was from such bailiff.

So, he ought to shew the time and place of the *rescous*. *R. Pal. 563.*

And that the person, to whom the sheriff directed his warrant, was his bailiff. *R. Sti. 155.*

And for what cause the warrant was directed to him. *R. Sti. 155.*

But it is sufficient to say, that he made a warrant to arrest, without saying *sub sigillo*, for the word *warrant* imports it. *R. 2 Jon. 197.*

So, it is sufficient to say that he was rescued out of the custody of a bailiff *virtute warranti sibi facti*; for this is out of the custody of the sheriff. *R. 2 Jon. 197. Adm. Sal. 586. R. 2 Lev. 28.*

That he was arrested in *com. predict.*, though it does not say *infra ballivam*; for it shall not be intended out of it, if it be in the county. *R. Yel. 51.*

That he was rescued from *A.*, bailiff of a liberty, to whom he directed his warrant, without saying, that he had *retorn. brevium*, for it shall be intended the bailiff of the sheriff, and the words, *of a liberty*, rejected. *R. Cro. El. 781.*

That

That several *se rescusserunt*, without saying *et quilibet eorum se rescussit*, per *Twissden*; for it is in the affirmative. 1 *Vent.* 2.

That he was rescued from the sheriff, tho' taken by the bailiff. *Str.* 417.

[If it appear on the return, that the warrant was to two, and the arrest by one only, yet the return is good; for it is no exception in what relates to public justice. *Rex v. Roe*, *M.* 5 G. *St.* 117.]

[If on a return of a *rescous* of two persons, it is only said they could not afterwards be found, (without saying, *nec eorum aliquis*,) it is ill. *Rex v. Tucker*, *M.* 6 G. *Str.* 225. *Fort.* 362.]

[That the bailiff arrested defendant, is good. *Ibid.*]

[That the defendant being in my custody, is sufficient. *Ibid.*]

[A return made by a sheriff that the person arrested was rescued out of the custody of the bailiff, is bad; it ought to be, out of his own custody. 2 *Term Rep.* 155.]

(D 6.) *Proceeding against the rescuer.*] If a *rescous* be returned, an attachment goes against the rescuer. 2 *Cro.* 419. 2 *Vent.* 175. *Sal.* 586.

[The sheriff's return of a rescue is of itself a conviction of a rescue, and process immediately issues from the crown-office against the rescuer. *Rex v. Pember*, *P.* 8 G. 2 *B. R. H.* 112.]

[*C. B.* grants attachment against the rescuer on affidavit, always; *B. R.* sometimes, but inclines to require a return. *Sheather v. Holt*, *M.* 9 G. *Grindney v. Touster*, *Meare v. Gallard*, *H.* 9 G. *Young v. Paine*, *T.* 5 G. 2. *Str.* 531.]

[The Exchequer will, on the return, make the attachment absolute at first. *Williams v. Evans*, *M.* 1724, *Bunb.* 181.]

[The attachment must be returnable at a general return. *Rex v. Wilkins*, *P.* 11 G. *Str.* 624.]

And when taken, the usual fine in *B. R.* is four nobles upon each. *D.* 2 *Jon.* 197. *Sal.* 586.

[The fine is discretionary; *Rex v. Elkins*, *M.* 8 G. 3. 4 *B. M.* 2129.]

Or, if he denies the fact upon interrogatories, he shall be discharged. *Sal.* 586.

[On *guilty of a rescue*, returned, but in no other case of contempt, the offender shall be punished without being examined on interrogatories; for the return must not be traversed. *Rex v. Elkins*, *M.* 8 G. 3. 4 *B. M.* 2129.]

But he shall not be discharged upon affidavit. *Sal.* 586.

[The rescuers, on submitting to a fine, may be permitted to read affidavits to shew there was no real arrest. *Rex v. Minify*, *M.* 12 G. *Str.* 642.]

Or, the return may be transmitted to the filazer, and process to outlawry go against the rescuer. *Sal.* 586.

But the return in *C. B.* is traversable. *Dy.* 212. but there in *marg.* held *cont.* and it is not now allowed. 2 *Vent.* 175.

[Return of *rescous* is not traversable, and the rescuer must be brought into court to be fined. *Barnes*, 429.]

So, in *B. R.* *Dub. Cro. El.* 781.

And after traverse, he may be bailed. *Dy.* 212. *a.*

[The rescuer taken may be admitted to give recognizance, to try false return against sheriff. *Barnes*, 430.] [If

[If there is verdict for plaintiff, the recognizance shall be discharged. *Barnes*, 430.]

(D 7.) *When it is not a good return.*] But *rescous* is not a good return upon a judicial process; as, upon a *capias ad satisfaciendum*, or *capias utlagatum*; for the sheriff may take the *posse comitatus*. R. 2 Cro. 419.

Nor, a *rescous* of goods taken upon a *feri facias*. R. 2 Rol. 459. l. 30. R. 2 Sand. 344. R. Lit. 296. [For sheriff may raise *posse comitatus*. *Barnes*, 430.]

Vide more concerning *Rescous*, in *Distress*, (D 3, &c.)—*Justices* (R).—*Pleader*, (2 S 29.)

RESERVATION.

Vide Rent, (B 1, &c.—C 6.)

RESIDENCE.

Vide Esqglife, (N 4.)—*Pleader*, (2 S 23.)

RESIDUARY LEGATEE.

Vide Chancery, (3 G 7.)

RESIGNATION.

Vide Esqglife, (N 2.)—*Franchises*, (F 30.)

RESPONDEAS OUSTER.

Vide Abatement, (I 14.)

RESTITUTION.

Vide Chancery (4 M).—*Forcible Entry*, (D 5, &c.)—*Justices* (2 A).

Restitution of Temporalities.

Vide Prerogative, (D 24.)

RESTRAINT OF TRADE.

Vide Trade, (D 1, &c.)

RESULTING USE.

Vide Uses, (K 7.)

RESUMMONS.

Vide Abatement, (I 32.)—*Process*, (D 2, 3.)

RESUMPTION.

Vide Parliament, (H 21.)

RETAINER.

Vide Justices of Peace, (R 58.)

RE-TAKING.

Vide Escape (E).

RETURN.

(A) Return of Writs and Process, to whom it belongs.

THE return of all writs and process, of right, belongs to the sheriff within his county. *Skin. 414.*

And the king cannot grant to any other to have *retorn. brevium* in a county. *2 Inst. 452. 1 Vent. 406.*

A subsequent sheriff may make a return of a writ delivered to his predecessor; for it is not directed to any one by name. *1 Sal. 266.*

And if the king grants the return of writs in such a precinct to another, the sheriff remains officer to the court, and the grantee is but a bailiff of a franchise, and ought to make a return to the sheriff. *1 Rol. 119.*

But by prescription, or the king's grant, a hundred, or franchise, may have *retorn. brevium* within their precinct. *1 Vent. 405. R. 1 Rol. 119.*

So, a bishop. *2 Rol. 202. l. 40.*

So, an honour. *Hard. 423.*

So, the lord of a manor. *R. Hard. 423.*

A grantee of *retorn. brevium* shall have the execution thereof as incident, tho' it be not expressed. *R. 1 Vent. 405.*

[By 13 G. 2. c. 11. §. 6. the sheriff, at the request and costs of the lord of a franchise, having return of writs, shall appoint a deputy to reside in or near the same, who, on receipt of process, shall issue his warrant to the lord of the franchise to execute the process.]

(B) Remedy for entering a Franchise.

(B 1.) When it lies.

IF a sheriff enters the franchise of him who has *retorn. brevium* to do execution, &c. an action upon the case lies against him. *1 Vent. 406. R. Sho. 18.*

And it is not necessary to shew a title to *retorn. brevium* in his declaration; but it is sufficient to say, that he was seized *de officio baliij libertatis*, and as bailiff had a right to the return and execution, &c. *R. Sho. 18. Vide Pleader, (C 39.)*

So, he need not shew that the sheriff had notice of the grant; for it is upon record. *R. 1 Rol. 119.*

(B 2.) When not.

(B 2.) *Where the sheriff enters with a non omittas.*] But upon default of the bailiff, &c. the sheriff may enter a franchise; and therefore, if the bailiff of a franchise does nothing upon the sheriff's mandate, a writ goes to the sheriff *quod non omittat propter aliquam libertatem* by the common law. 2 *Inst.* 453.

And this is now confirmed by the *st. W. 2. 13 Ed. 1. 39.*

So, if the bailiff of a franchise makes an insufficient return. 2 *Inst.* 453.

[If sheriff's mandate to bailiff of a liberty leaves a blank for name of liberty, *cap. ad resp.* shall be quashed, unless bail is put in. *Barnes, 416.*]

(B 3.) *Where he enters without a non omittas.*] So, by the *st. Marl. 52 H. 3. 21.* and the *st. W. 2. 17.* if the bailiff of a franchise does not make replevin, nor answer, the sheriff may enter the franchise without a *non omittas.* *F. N. B. 68. F. 2 Inst. 140. 194.*

So, if the king be party, the sheriff may enter the franchise without a *non omittas*; as, upon process against a felon. *Pl. Com. 216. a. 1 Vent. 406.*

Or, the process for the king shall be with a *non omittas.* *Semb. Pl. Com. 216. a.*

So, where the sheriff acts as a judge; as, upon an inquisition for waste; for by the statute he is commanded *quod accedat ad locum vastatum.* 1 *Vent. 406.*

So, upon a writ of inquiry of damages; for it is an inquest of office, and no venue is necessary. *R. 2 Rol. 461. l. 50. Hob. 83.*

(C) Return how made.

(C 1.) At what Time.

THE return of a writ ought to be made before or upon the day of return named in the writ. *Mod. Ca. 148. 159. 196. 250.*

But a return which appears to be made after the day of return is bad. *Mod. Ca. 148. 159. 196. 250.*

So, if the day of the return be *Sunday*, and the return appears to be made by the record upon *Tres. Trin.* which is a *Sunday*, it will be bad. *Mod. Ca. 148. 159. 196. 250.*

And in such case it cannot be made upon a subsequent day. *R. Mod. Ca. 148. 159.*

And the court will take notice of the defect, without assignment upon record. *R. Mod. Ca. 196.*

[If a writ is returnable at a return-day, and not a day certain, the sheriff need not return it till *quarto die post.* *Makepiece v. Dillon, H. 8 G. Fort. 363.*]

[A bill of *Middlesex* may be returned the day on which it is sued out. *Oxlade v. Davidson, B. R. E. 32 Geo. 3. 4 T. R. 610.*]

(C 2.) In what Manner.

So, the return ought to be under the name of the proper officer. *Pl. Com. 63. a.*

Q 2

By

By the *ſt.* 12 *Ed.* 2. 5. the ſheriff ſhall put his name to the return, that the court may know whoſe return it is.

And in *London*, where there are two perſons, both ought to put their names; for they are but one ſheriff. *Hob.* 70. 39 *H.* 6. 41.

So, if a return be by coroners, all ought to ſign it. *Hob.* 70. It ought to be in the name of all. *R.* 39 *H.* 6. 41. *Vide infra.*

But if the ſheriff does not put his name, the return will be good, and the ſheriff ſhall be amerced. 1 *Leo.* 139. *Semb. cont.* *Hob.* 70. *Dub. Dal.* 68.

So, in the pleading of a return the name of the ſheriff need not be mentioned. *R.* 1 *Leo.* 139.

So, if a return be in the name of the ſheriff, by him who is not ſheriff, it cannot be aſſigned for error, tho' the court, upon complaint of the irregularity, will give time to the ſheriff to diſavow his return. 1 *Sal.* 265.

So, if a return be by coroners, it is ſufficient to have the name of office, without their proper names. *R.* *Cro. El.* 703. *Mo.* 548.

So, if a return be but by one coroner, it ſhall be helped as an inſufficient return. *R.* *Hob.* 70.

So, now by the *ſt.* 21 *Jac.* 1. 13. the want of the ſheriff's name ſhall be aided. *Vide Amendment*, (G 1, 2.)

So, if a new ſheriff returns a writ, with a return made by his predeceſſor, which concludes, *A. B. late ſheriff*, it will be good; for the ſheriff need not mention his office; for his name and ſurname are ſufficient, and then if he adds *late ſheriff*, it does not prejudice. *R.* *Cro. Car.* 189. 570.

So, if the ſheriff indorſes, and does not ſubſcribe his name, it is ſufficient. *R.* *Carth.* 56.

If he indorſes his name *A. B. Mic.* for *Mil.* it ſhall be amended. *Dub. F. g.* 5.

[He may make and deliver the return of the writ anywhere. 1 *Willf.* 328.]

[If a writ is directed to *Henry Earl of Litchfield*, and it is returned by *George Henry Earl of Litchfield*, it is good; for there can be but one *Earl of Litchfield*, and therefore a variance of the Chriſtian name is not material. *Ingolſby v. Martin*, T. 6 G. Str. 316.]

[By *ſtat.* 20 G. 2. c. 37. the ſheriff ſhall, at the expiration of his office, turn over to his ſucceſſor all proceſs unexecuted, who ſhall execute and return. Sheriff neglecting to turn over, liable to make ſatisfaction to party aggrieved.]

(D) Return in Excuse.

(D 1.) *Tarde.*

A Return ought to ſhew obedience to the writ, or a good excuſe for his omiſſion; as, he may ſay, *quod breve adeo tarde venit quod exequi non potuit.*

But by the *ſt.* W. 2. 39. the plaintiff or demandant may require a bill from the ſheriff upon the delivery of the writ to him, in the county, or upon record, and then an action will lie againſt him, if he returns *tarde.* 2 *Inſt.* 452.

So, *tarde* is not a good return upon a *capias ad reſpondendum.*

So,

So, the sheriff cannot return the answer of the bailiff of a franchise, *quod tarde*, &c. 2 *Rol.* 461. l. 20. *Vide post.* (F 2, 3.)

Nor, *tarde* to part; as, a summons to one defendant, *tarde* as to another, &c. R. 2 *Leo.* 175. 4 *Leo.* 57.

(D 2.) Neglect of the Party.

So, he may say, that he was always ready to deliver seisin, &c. and gave notice such a day, but the plaintiff did not come to receive it. R. 2 *Rol.* 459. l. 25.

In replevin, that no one came to shew the cattle. 2 *Leo.* 67.

On a writ which says, if the plaintiff *fecerit te securum*, &c. that the plaintiff did not find pledges.

But it is not a good return to say, *quod visum habere non potui*. 2 *Rol.* 460. l. 50.

That the plaintiff did not prosecute his writ. 2 *Rol.* 460. l. 35.

(D 3.) Mandavi Ballivo.

So, he may say, *mandavi ballivo*, &c. *qui nullum dedit responsum*. 2 *Rol.* 460. l. 50.

Or, *who made such a return*. 2 *Rol.* 461. l. 45.

So, upon an *elegit*, there shall be a mandate to the bailiff, who shall make the inquisition and extent. R. *Cro. Car.* 319.

But upon a writ of inquiry directed to a sheriff, he cannot say *mandavi ballivo*, &c. for he is to execute it at any place within his county. R. *Hob.* 83. *Vide ante*, (B 3.)

Nor, upon process at the suit of the king. *Vide ante*, (B 3.)

Nor, upon a *distringas juratores*. 19 *H.* 6. 67. a.

So, by the *st. W.* 2. 39. the treasurer and barons of the *Exchequer* shall deliver to the justices a roll of all liberties that have return of writs; and if the sheriff returns *mandavi ballivo* of any other liberty, he shall be punished by fine and ransom. 2 *Inst.* 452.

So, if he returns *mandavi ballivo* of a county, who has a patent for the return of writs; for such grant is void. 2 *Inst.* 452.

(D 4.) Rescous.

So, he may return a *rescous*. *Vide Rescous*, (D 4, 5.)

(D 5.) Defendant removed by Habeas Corpus, &c.

So, the sheriff may say, that the defendant, being arrested by him, was afterwards removed by *habeas corpus*, returnable such a day in *Chancery*, and there discharged out of his custody. 1 *Leo.* 145.

And was committed to another in custody. 1 *Leo.* 145.

That another writ of the same *teste* and return came to him before, to which he made a return. R. *Mod. Ca.* 61.

(D 6.) What is not a good Excuse.

But it is not a good return, that he was resisted, and therefore disabled to make execution of the writ; for by the *st. W.* 2. 13 *Ed.* 1. 39. he may take the *posse comitatus*. 2 *Inst.* 454. *Vide Rescous*, (D 7.)

Quod visum averiorum habere non potuit; for he does not shew any endeavour. 2 Rol. 560. l. 40.

So, it is not a good return, that the sheriff levied goods upon a *feri facias*, and afterwards lost them. D. 1 Vent. 52.

Or, that such person rescued the goods. R. 1 Vent. 21. D. 1 Vent. 52. R. Sbo. 180. Vide Rescous, (D 4. 7.)

So, *non est inventus* is not a good return, where the sheriff has a writ delivered to him against his bailiff, and he ought to amend his return, and shall be amerced. 1 Vent. 12. 24.

(E) Return to a Writ in Chief.

(E 1.) Must be certain.

(E 1.) *What* A Return to a writ ought to be certain; and *will be uncertain.*] therefore, if it says *non affets*, or *non est inventus*, *prout mihi constare poterit*, it is bad. 2 Rol. 460. l. 25.

Quod non deliberavit pro eo quod visum habere non potuit; for perhaps he did not endeavour it. 2 Rol. 460. l. 40.

(E 2.) *What sufficiently certain.*] But if the return shews the command of the writ performed, it is sufficient, tho' it does not say by whom, or how; as, if it says, *infra nominatus A. captus est*. Sal. 589.

Attachiari feci; for *qui facit per alium facit per se*. R. Sal. 589. Skin. 552.

So, if it shews the command of the writ performed in substance; as, if it says, *scire feci*, or *summ. feci*, &c. *per A. and B.* without saying, *probos et legales homines*. 2 Rol. 459. l. 50. 53.

So, if it refers to the writ, it is sufficient, without repeating the words of it; as, *scire feci prædict. A. essendi sec. tenor brevis*, without saying where, or what to do. 2 Rol. 460. l. 2.

Ad faciend. quod breve requirit. 2 Rol. 460. l. 5.

So, it is sufficient if the return may be ascertained by the writ; as, where a writ is, *scire facias A. B. mil.*, it is sufficient to say, *scire feci mil. infra nominat*. 2 Rol. 460. l. 15.

That the said A. B. est mortuus, without saying miles. 2 Rol. 460 l. 10.

Scire feci A. B. prout mihi præcipitur, without saying, *infra nominat* Sal. 589.

So, surplusage in a return shall be rejected; as, *parat. habeo ubicunq.* for *ubicunq.* shall be rejected. R. Sal. 589.

(E 3.) Must answer to the whole Writ.

So, the return ought to answer to the whole command of the writ, and therefore a return of a panel with nine names, or other number less than the writ requires, is bad. 2 Rol. 461. l. 2.

So, a return upon a *grand cape, cepi in manus*, &c. if it says nothing to the summons of the tenant. 2 Rol. 461. l. 5.

A return upon a *scire facias* against an heir and terre-tenants, if it says nothing as to the heir. R. per three J. Cro. Car. 295.

A return upon an *extendi facias* upon a statute, that he has delivered such lands; if it does not say that there are no other lands. 1 Brownl. 37.

So,

So, if upon a *petit cape*, where the count was for a house and stable, the return is, *cepi* the said house, and says nothing as to the stable. *R. Jon. 357.*

So, if upon a *feri facias*, returnable *Ost. Mich.*, the return is *nulla bona* at *Mich.*; for perhaps the defendant had some before *Ost. Mich.* *R. Cro. El. 512.*

(E 4.) Must not be contrary to a Record.

But a sheriff cannot make a return contrary to his former return upon record; as, if he return upon a *venire facias* twelve jurors, he cannot say upon the *distingas*, that one *nil habet*. *2 Rol. 458. l. 25.*

So, if he has returned a distress, he cannot upon the grand distress, *alias* or *pluries*, say, *nothing by which he may be distrained*. *2 Rol. 458. l. 35.*

If upon a *capias pro fine*, he returns *cepi*, and upon the *capias ad satisfaciend.*, *non est inventus*. *R. 1 Leo. 51.*

So, he cannot make a return contrary to a return by his predecessor. *2 Rol. 458. F.*

But a return, not repugnant to a former return, may be made, tho' it varies therefrom; as, he may say, evicted by an elder title *mesne* between this and the former writ, *et sic nihil habet*. *2 Rol. 458. l. 30.*

Or, that he had the land *pur auter vie*, in right of his wife, &c. who is now dead. *2 Rol. 458. l. 33.*

That he has nothing *præter* the issues *prius forisfact.* *2 Rol. 458. l. 40.*

So, a return cannot be made contrary to a matter of record; as, if upon *plene administravit* it be found for the plaintiff, upon which execution goes *de bonis testatoris* to the sheriff of the same county, he cannot return *nulla bona*. *2 Leo. 67. R. cont. 3 Leo. 2.* for he says, *nulla bona in balliva sua*, and therefore it is not repugnant.

But after a verdict for the plaintiff upon *plene administravit*, the sheriff of the same county may return a *devastavit*. *2 Leo. 67.*

So, upon a *constat* entred of goods in another county, and a *testatum* thereon, the sheriff may say *nulla bona*. *2 Leo. 67.*

(E 5.) Must not falsify the Writ.

So, the return ought not to falsify the writ; for that belongs to the defendant, and therefore in replevin he cannot say, *no cattle taken*; for this goes to the point of the writ. *Sal. 581. Adm. cont. Kit. 263. a.*

If there be judgment against *A. G.* widow, and a *ca. sa.* thereon, and before execution of the writ she marries *B.*, the sheriff cannot return, that she is now the wife of *B.*, for that falsifies the writ and record. *R. 2 Cro. 323. 2 Bul. 81.*

(E 6.) Bad Return, how aided.

(E 6.) *By appearance.*] But an insufficient return by the sheriff will be aided by the appearance of the party; as, in a *scire facias* upon a fine or judgment, if the sheriff does not mention the summoners or viewers. *Kit. 279. b.*

In a *scire facias* against an heir and terre-tenants, if he says nothing as to the heir. *Dub. Cro. Car. 295, 6.*

So, if he does not mention the summoners upon the return of a *grand cape*. *Kit. 279. b.*

So, if the sheriff does not return issues upon a *distringas juratores*, it will be aided by the appearance of the jurors. *Kit. 279. a.*

(F) Remedy against the Sheriff.

(F 1.) If he do not make a Return.

IF the sheriff does not return a writ delivered to him, when it ought to be returned, he shall be amerced *quousq.* 2 *Inst.* 452.

[In what time the sheriff must return a writ, and on whom the rule for a return must be served, see *Rex v. Coles*, T. 20 *Geo. 3.* *Dougl.* 420.]

By the *st.* 1 *Ed. 6.* 10. 5 (or 5 & 6) *Ed. 6.* 26. & 31 *El.* 9. the sheriff, &c. forfeits 5*l.* if he does not return proclamations upon an *exigent* in *Wales*, or a county palatine.

And by the *st.* 7 *Ed. 6.* 1. if he does not return a writ concerning issues, or a debt, to the king, the sheriff may be fined or amerced by any court of revenue.

So, in a real action, after summons, if the sheriff does not return the writ, an action upon the case lies against him. *Adm. Cro. El.* 175. 1 *Leo.* 146. 1 *Rol.* 93. l. 20.

So, by the *st.* *W.* 2. 13 *Ed. 1.* 39. if any fear the malice of a sheriff, that he will not return a writ, he may deliver his writ in full county, and take a bill from the sheriff or under-sheriff, mentioning the names of the demandant and tenant, and day of delivery of the writ, to which the sheriff or under-sheriff, on request, shall put his seal, or, if he will not, some present may put their seals, &c. And if the sheriff return not the writ, &c. the demandant or plaintiff shall have his damages, with respect to the nature of the action, and the danger by the delay.

And by the *st.* 2 *Ed. 3.* 5. the sheriff is obliged to take the writ, and sign such bill. 2 *Inst.* 451.

And in such special case an action upon the case lies against the sheriff, if he does not return the writ. 2 *Inst.* 452.

So, a demandant or plaintiff, to take the benefit of the statute, may deliver the writ to the sheriff, upon record, in court. *Ibid.*

So, an action upon the case lies for not returning a *capias utlagatum* upon *mesne* process. *Cl. Aff.* 262.

Or, an *exigent*.

So, all *mesne* process ought to be returned; for otherwise the arrest thereon will be wrongful, and false imprisonment will lie against the sheriff. *R.* 5 *Co.* 90. 2 *Rol.* 563. l. 20.

Yet, false imprisonment does not lie against the party himself, a bailiff, or him who acts in aid of the arrest, if the writ be not returned, because the return is not in their power. *Cont.* 2 *Rol.* 563. l. 30. 40. *R. acc.* 2 *Rol.* 562. l. 35. 45. 50.

So, if an *elegit* be not returned, the execution will be void; for it is not an act of the sheriff alone; but there ought to be an inquisition taken. *R.* 4 *Co.* 67. a. *R.* 5 *Co.* 90. a.

So, if an officer of an inferior court does not return process directed to him, false imprisonment lies against him. *R.* 2 *Rol.* 563. l. 10.

So,

So, a *certiorari* lies to the sheriff, to return an outlawry or re-disseisin.

But where final process issues, upon which no judgment or other process is to be had, no return is necessary; as, upon a *feri facias* which levied the whole debt. *R. 5 Co. 90. Cro. El. 209. 238. Mo. 468. R. 1 Sal. 318. R. 4 Leo. 194.*

Or, a *capias ad satisfaciendum*. *R. 4 Co. 67. a. 5 Co. 90.*

Or, a *liberate* after an *elegit*. *R. 4 Co. 67. a. R. 5 Co. 90. Semb. 1 Leo. 280.*

Or, an *habere facias seisinam*, or *possessionem*. *R. 4 Co. 67. a. 5 Co. 90.*

[Sheriff shall be obliged to return *ca. fa.* tho' he shews by affidavit that he had taken defendant, and discharged him, on a letter from a peer that he was his menial servant. *Wickham v. Hobart, M. 10 G. 2. B. R. H. 348.*]

[If defendant is protected and protection registred, the court will discharge a Treasury rule for return. *Barnes, 417.*]

[If sheriff returns defendant protected, the court will not make rule for better return; if insufficient, plaintiff may apply next term for attachment. *Barnes, 425.*]

Yet, if the sheriff does not return a judicial process, he may be amerced for his contempt; for the writ says, *ita quod habeas*, &c. *R. 5 Co. 90. b.*

So, if full execution be not done upon a prior writ, a subsequent execution cannot be taken, till the former is returned; as, if only part be levied upon a *feri facias*. *R. 1 Sal. 318.*

So, regularly, an action upon the case does not lie against the sheriff for not returning a writ, without other default; for he shall be amerced. *Semb. 2 Inst. 452.*

[By *stat. 20 G. 2. c. 37.* the sheriff is not liable to be called upon to make a return, unless required so to do in six months after the expiration of his office.]

[By the true construction of the statute, the months are to be lunar ones, and the day on which the sheriff goes out of office is to be reckoned part of the six months. *Rex v. Adderley, M. 21 Geo. 3. Dougl. 463.*]

[A sheriff is not liable to an attachment for not returning a writ, if not called upon by a rule of court within six months after the expiration of his office, notwithstanding he was requested by the party to return it before the six months were expired. *Rex v. Jones, T. 27 Geo. 3. 2 T. R. 1.*]

[Where a sheriff has been guilty of a contempt in the course of a civil suit, and then the defendant dies, an attachment may issue against the sheriff afterwards for the prior contempt. *Rex v. Sheriff of Middlesex, H. 29 Geo. 3. 3 T. R. 133.*]

[If the sheriff appoint a special bailiff at the plaintiff's request, the latter cannot rule the sheriff to return the writ. *De Moranda v. Dunkin, B. R. M. 31 Geo. 3. 4 T. R. 119. 2 Bl. 952.*]

[Plaintiff's attorney, having blank-warrants, does not carry writ to under-sheriff till a year after the return, the court will not make rule for return. *Barnes, 423.*]

[If sheriff directs warrant to bailiff of plaintiff's nomination, and has indemnity indorsed on the writ; yet, plaintiff may call for return. *Barnes, 411.*]

[If

[If the warrant is directed to officers of plaintiff's nomination, not to the officers of bailiff of a franchise, no rule to return sheriff's mandate. *Barnes*, 416.]

[If under-sheriff absconds, court will make rule, that leaving copy of rule to make return at his house, shall be good. *Barnes*, 35.]

[If defendant has continued in custody since arrest, rule to bring in body shall be discharged, otherwise if escape. *Barnes*, 32. 381.]

[Delivery of original rule to bring in body to under-sheriff, is good service on high-sheriff. *Barnes*, 405.]

[By rule in *B. R. T.* 31 *Geo.* 3. it is ordered, that where any sheriff, before his going out of office, shall arrest any defendant, and a *cepi corpus* shall be afterwards returned, he shall and may within the time allowed by law be called upon to bring in the body by a rule for that purpose, notwithstanding he may be out of office before such rule shall be granted. 4 *Term Rep.* 379.]

[By rule in *B. R. M.* 32 *Geo.* 3. it is ordered, that in future all writs should be returned by the sheriff on the day on which the rule for returning the same should expire, and in default thereof that the plaintiff should be at liberty to move for an attachment on the next day. 4 *T. R.* 496.]

[A sheriff ought not to be ruled to bring in the body until the day after the expiration of the rule to return the writ; and if he be, and be attached for not obeying it, the court will set aside the attachment for irregularity. *Hutchins v. Hird*, *B. R. H.* 34 *Geo.* 3. 5 *T. R.* 479.]

(F 2.) If he makes a false Return.

So, for a false return the sheriff may be amerced, according to an ordinance against sheriffs. *Rast.* 372. a. By the *st.* 28 *Ed.* 1. 16.

So, if a sheriff alters the return of a bailiff of a franchise, he shall answer to the king, and to the bailiff for the damage to him. 2 *Rol.* 563. l. 25.

So, for a false return, an action upon the case lies against a sheriff by the common law. 2 *Inst.* 452. *R.* 4 *Mod.* 404. *R. Mo.* 349.

[If the return be false in substance, tho' true in words, an action will lie. *Dougl.* 159.]

So, false imprisonment; for it makes him a trespasser *ab initio*. 2 *Rol.* 563. l. 15.

So, if a bailiff of a franchise makes a false answer to the sheriff, an action upon the case lies against him. *R.* 1 *Rol.* 98. l. 37. 99. l. 30.

So, if a sheriff returns a false answer of a former bailiff, who was not a minister at the time of the return, an action upon the case lies against the sheriff. *R.* 1 *Rol.* 99. l. 35.

[The court will not try the truth of a return, on a motion to set aside proceedings; but the party will have his action. *Bar v. Satchwell*, *M.* 2 *Geo.* 2. *Str.* 813.]

[Fifty pounds damages are not excessive on an action for a false return of a rescue, whereon plaintiff had been imprisoned. *Barnes*, 229.]

But an inferior officer shall not be prejudiced by a false return of the sheriff; as, if a bailiff, &c. by warrant of the sheriff, levies a debt upon a *feri facias*, and delivers it to the sheriff, who returns *tarde*, &c. an action does not lie for the money against the bailiff. *R.* 1 *Leo.* 144. *Crö. El.* 181.

So,

So, if a sheriff returns a false answer made by a bailiff of a franchise, the sheriff shall not be amerced, nor shall there be an action upon the case against him, but against the bailiff. 2 Rol. 461. l. 35. R. 1 Rol. 98. l. 37. 99. l. 30.

So, if a sheriff returns the answer of a bailiff, *cepi corpus*, and the bailiff has not the body, an attachment goes against him. Ray. 193.

So, an action does not lie against a sheriff for a return in course, tho' it be false; as, if he returns *elongata* upon a replevin, when he cannot make deliverance; for he has no other return, except that *nona* *sheved him the cattle*. Sal. 581.

(F 3.) Or, an insufficient Return.

So, the sheriff shall be amerced for an insufficient return.

So, if the sheriff returns an insufficient answer of the bailiff of a franchise; for he may say, *nullum dedit responsum*. R. 2 Rol. 460, l. 50.

As, that the bailiff returned *tarde*; for it is the fault of the sheriff that he had not the writ before. 2 Rol. 461. l. 20.

So, if he returns the answer of a former bailiff, after a new one chosen. R. 2 Rol. 461. l. 10. Cro. El. 512.

If by his return he says he did that which the bailiff ought to do, 2 Rol. 461. l. 30.

But an action upon the case does not lie for an insufficient return, *Semb. Cro. El. 512.*

(G) Averment against a Return.

SO, the return of a sheriff is of such high regard, that generally no averment shall be admitted against it; as, if *A.* be returned to be outlawed, he cannot say that he was only *quarto* or *quinto exactus*. Kit. 280.

If a sheriff returns issues upon *B.*, it cannot be averred by *A.*, to save the issues, that his name is not *B.* 2 Rol. 462. l. 5.

If a sheriff, in *redisseisin*, returns, *accessi ad terras*, &c. it cannot be assigned for error, *quod non accessit*. 1 Leo. 183.

If coroners make a return, it cannot be said that only one made the return. R. Ray. 485.

If a sheriff returns, *scire feci A. tenen. un. mes.*, *A.* cannot plead *non tenet*. R. Cro. El. 872. R. 2 Mod. 10.

But where his life or inheritance is in jeopardy, an averment shall be allowed against the return; as, if *A.* be outlawed for felony, he may say that he tendered surety before the fifth county. 2 Rol. 462. l. 15.

So, if a summons be returned in a *præcipe quod reddat*, the tenant may say that he was summoned by another name, for otherwise he will lose by default. 2 Rol. 462. l. 10.

So, if a return be by an improper officer; as, if upon a certificate obtained by the Attorney-General, to certify whether *A.* be outlawed, the coroners return that he is outlawed, *A.* may say, *non utlagat.*, for the sheriff was the proper officer to certify the outlawry, tho' it be pronounced by the coroners. R. Dy. 223. a.

So, by the *β. W.* 2. 39. if the sheriff returns none, or too small issues, it may be averred that he had greater issues; upon which there shall be a writ of inquiry to the judge of assise.

R E T O R N.

Bad Return.

Vide Abatement, (H 15.)

False Return.

Vide Parliament, (D 15.)

Vide more concerning Return, in Amendment, (G 1, 2.)—Certiorari (C).—Execution, (C 7.)—Habeas Corpus, (E 1, &c.—I.)—Mandamus, (D 1, &c.)—Parliament, (D 13.)—Pleader, (B 5.)—Process (B).—Rescous, (D 4, &c.)

R E T R A X I T.

Vide Pleader, (X 2.)

R E V E N U E.

Vide Parliament, (H 20.)—Prerogative, (D 39, &c. 87, &c.)

R E V E R S I O N.

Vide Copyhold, (C 12.)—Devise, (N 19.)—Estates, (B 10, 11, 12. 31.)—Officer, (B 13, 14.)

R E V E R S I O N E R.

Vide Receipt, (A 2.—B 2.)—Recovery, (B 7.)

R E V E R T E R.

Vide Pleader, (3 E 3.)

R E V I E W.

Bill of Review.

Vide Chancery (G).

Commiffion for Review.

Vide Prerogative, (D 16.)

R E V I V O R.

Bill of Revivor.

Vide Chancery (F).

R E - U N I O N.

Vide Franchises, (G 1.)

R E V O C A T I O N.

Vide Arbitrament, (D 5.)—Chancery, (4 O 1, &c.)—Copyhold, (F 12, 13.)—Devise, (F 1, 2.)—Esglise, (H 10.)—Pojar, (A 1.)—Uses, (L 2, &c.)

REVOUCHER.

Vide Voucher (C).

RIGHT.

Vide Droit.—*Garranty* (F—G).—*Grant* (D).—*Pleader*, (E 22.)—*Release*, (B 1, &c.—E 2.)—*Remitter*, (A 1, &c.—C 2, 3, 4.)

Right of Advowson.

Vide Dismes, (M 10.)—*Quare Impedit*, (B 1.)

Bare Right.

Vide Assignment, (C 2.)

Right Close.

Vide Droit, (C 1, &c.)

Common Right.

Vide Copyhold, (S 16.)—*Dismes*, (K 1. 14.)

Right upon a Disclaimer.

Vide Droit (F).

Right of Dower.

Vide Dower, (G 1.)

Right Patent.

Vide Droit (B 1, &c.—D).

Prescriptive Right.

Vide Copyhold, (S 17.)

Right of Ward.

Vide Guardian, (H 1.)

Writ of Right.

Vide Battell, (A 2.)—*Droit*, (B 1, &c.—E, &c.)

RIOT.

Vide Forcible Entry, (D 8, &c.)—*Justices of Peace*, (B 9.)

ROBBERY.

Vide Appeal, (A 2.)—*Justices*, (O 1, &c.—Y 8.)—*Pleader*, (2 S 4.)

ROGUES.

Vide Justices, (S 9.)—*Justices of Peace*, (B 76, &c.)

ROLLS:

Master of the Rolls.

Vide Chancery, (B 4.)

ROUT.

Vide Forceable Entry, (D 8, &c.)

R O Y.

(A) The King of England, who shall be.

(A 1.) By Descent.

THE king of *England* holds his kingdom by descent, upon which his succession is attendant. 7 Co. 10. b. Calvin.

And therefore if a king, having a defeasible estate, dies seised, the descent tolls the entry of him who has the right, which could not be, if the title of the successor was by succession, and not by descent. 7 Co. 11. a. Calvin.

And the king's title is complete by descent, before his coronation, which is but a ceremony. 7 Co. 10. b. Calvin.

And therefore high treason may be committed before, as well as after it. R. 7 Co. 11. a. Calvin.

So, he begins his reign upon the day on which his ancestor died: R. per all the J. 1 And. 44. Bend. 79.

(A 2.) By what rules the descent shall be governed.] The descent of the crown varies from the general rules of descent as to a subject; and therefore, if the king dies without issue male, having several daughters, the descent of the crown, and lands of the king, shall be to his eldest daughter only. Co. L. 15. b.

So, if he dies without issue, or brother, having several sisters, it shall be to the eldest. Ibid.

If he has a son and a daughter by one *venter*, and a son by another, and the eldest son enters, and dies, the other son shall have it, and not the daughter of the whole blood; for *possessio fratris*, or half blood, does not take place. Ibid.

If a king, by descent on the part of his mother, purchases land to him and his heirs, it shall descend with the crown to the heir of the part of the mother, and not to the heir of the part of his father. Ibid.

(A 3.) By Act of Parliament.

So, the descent or succession of the crown may be limited by act of parliament. *Vide Parliament, (H 18, 19.)*

So, by the *st.* 4 & 5 An. 8. & 6 An. 7. if any shall maliciously, advisedly, and directly, by writing or printing, maintain that the king and parliament of this realm cannot make laws to bind the crown of this realm, and the descent, limitation, inheritance, and government thereof, he shall be guilty of high treason.

And

And if, by preaching, teaching, or advised speaking, he so maintain, he shall incur a *præmunire*.

So, qualifications may be required of him who shall be admitted to the possession of the crown, for want of which he shall be excluded.

By the *st.* 1 *W. & M.* 2. *Parl.* 2. every person, who shall be reconciled to or hold communion with the church of *Rome*, or profess the popish religion, or marry a papist, shall be excluded, and for ever incapable to inherit or enjoy the crown, &c. And in such case the people are hereby absolved from their allegiance, and the crown shall be enjoyed by such, being protestants, as should have enjoyed the same, if the person so reconciled, &c. were naturally dead.

And every king, on the first day of his first parliament, or at his coronation, which shall first happen, shall repeat and subscribe the declaration against popery in the *st.* 30 *Car.* 2.

So, by the *st.* 12 & 13 *W.* 3. 2. every one who succeeds to the crown by the limitation of the same statute.

And by the same *stat.* every one who shall hereafter come to the possession of the crown shall join in communion with the church of *England*, and not go out of his realms (repealed by 1 *Geo.* 1. *stat.* 2. *ch.* 5 1.) without consent in parliament.

So, the king cannot subject his kingdom to the pope, or any other, or to the payment of a yearly tribute to him, without the assent of the lords and commons. 3 *Ed.* 1. 2 *Roll.* 163. l. 35. *R. in Parl.* 40 *Ed.* 3. 4 *Inst.* 13.

(B) The Style of the King.

THE style of the king is not parcel of his name.

Yet upon the omission of an usual part of the style, a writ shall be quashed; as, an omission of *Scotia*, &c. 2 *Lev.* 223.

William the Conqueror was styled *Will. Rex*, or *W. Rex, Anglorum.* *Co. L.* 7. a.

W. Rufus, *W. Rex*, or *Rex Anglorum*, or *Dei Gratia Rex Anglorum.* *Co. L.* 7. a.

Hen. 1. and *Stephen*, *Henr.* or *Steph. Rex Anglorum*, or *Dei Gratia Rex Anglorum.* *Ibid.*

Maud, *Matildis Imperatrix*, *H. Regis Filia*, et *Anglorum Domina.* *Ibid.*

Hen. 2. *H. Rex Anglia*, *Dux Norman.* & *Aquitania*, & *Comes Andegavia.* *Ibid.*

So, *Ric.* 1. and *K. John*; but the last added *Dominus Hibernia.* *Co. L.* 7. b.

Hen. 3. had his style as *K. John*, till the 44th year of his reign, when he was styled only *Rex Anglia*, *Dominus Hibernia*, and *Dux Aquitania.* *Ibid.*

So, *Ed.* 1, 2, and 3. till the 13th year of his reign, when he was styled *Edw. Dei Gratia Rex Anglia & Francia*, & *Dominus Hibernia.* *Ibid.*

So, *R.* 2. *Hen.* 4. and *Hen.* 5. till the 8th year of his reign, when he was styled *Henricus Rex Anglia*, *Hares & Regens Francia & Dominus Hibernia.* *Ibid.*

Henr. 6. was styled *H. Dei Gratia Rex Anglia & Francia*, & *Dominus Hibernia.* *Ibid.*

After his restoration he added, *ab Inchoatione Regni sui* 49, & *Reception. Regia Potestatis* 1. *Ibid.* So,

So, *Edw. 4. Ric. 3. and Hen. 7.* were styled as *Hen. 6.* before his deposition. *Co. L. 7. b.*

And *Sovereign Lord, Leige Lord, Highness, or Kingly Highness,* were appellations used to the king before the time of *Hen. 4.* to whom *Grace* was attributed, *Excellent Grace* to *Hen. 6.* *Majesty* to *Hen. 8.* *Co. L. 7. a.*

Hen. 8. was stiled *H. Dei Gra. Rex Angl. & Fran., & Dominus Hibern.,* in the beginning of his reign. *Co. L. 7. b.*

In the 10th year of his reign he added *Octavus, Hen. Octavus Dei Gra., &c. Ibid.*

In the 13th year he added, *Fidei Defensor. Ibid.*

In the 22d year, *Supremum Caput Ecclesie Anglicane. Ibid.*

In the 23d year he was styled, *H. 8. Dei Gr. Ang. Franc. & Hib. Rex, Fidei Defensor, & in Terrâ Ecclesie Anglicane & Hibern. Supremum Caput. Co. L. 7. b.* and this by the *st. 35 H. 8. 3. 4 Inst. 344.*

So, *Ed. 6.* and *Mary,* in the beginning of her reign; but she soon omitted *Supremum Caput. Co. L. 7. b.*

After her marriage with *Philip,* the style was, *Philip & Mar. Dei Gra. Rex & Reg. Angliæ, Franciæ, Neapolis, Hierosol., & Hibern., Fidei Defensor, Princip. Hispan. & Scicil., Archd. Austria Ducis, &c.*

Q. Eliz. was styled *Eliz. Dei Gratiâ Angliæ, Franciæ, et Hiberniæ Regina, Fidei Defensor.*

So, *Jam. 1., Cha. 1. & 2., Jam. 2. &c.* each was styled, *Dei Gratiâ Angliæ, Scotiæ, Franciæ, & Hiberniæ Rex, Fidei Defensor.*

(C) Coronation.

CORONATION is the usual ceremony for the inauguration of the king.

William the Conqueror and his successors were all *coronâ insigniti* *Brad. 190. 217. 233. 298. 421. 462. 522.*

At the time of the coronation, the consent of the people was usually asked. *Bra. 190.*

So, an oath was usually required of the king, to do justice, maintain the peace, the laws and liberties of the church and kingdom. *Bra. 190. 217. 234. 421. 522. Braet. 1. b. Stamf. P. C. 99. a.*

And sometimes, by his oath, he was bound to do some particular things; as, *Stephen. Bra. 272.*

By the *st. 1 W. & M. 6.* every king and queen of this realm, at the coronation, shall swear to govern according to the statutes, laws, and customs of the realm; to cause law, and justice in mercy, to be executed; to maintain the laws of God, the protestant religion established by law, the rights and privileges of the clergy.

And by the *st. 12 & 13 W. 3. 2.* every king and queen, who succeeds to the crown by virtue of the said act, shall have the coronation oath administered to him at his coronation, pursuant to the said act.

But the king is complete before his coronation. *Vide ante, (A 1.)*

(D) Dignity of the King.

THE king of *England* has two capacities, natural and politic. *7 Co. 10. a. Calvin. Pl. Com. 213.*

In respect of his politic capacity, the king never dies. *7 Co. 10. b. Calvin.*

So,

So, the king never has disability by infancy or nonage. 7 Co. 12. a. Calvin. R. Pl. Com. 213.

So, if the king be attainted for high treason; when the crown descends or comes to him, the attainder is discharged, and he is able *ipso facto*, when he takes upon him to be king. R. 1 H. 7. 4. b.

So, the king cannot be seised to the use of, or in trust for another. Lane, 54.

And therefore, if a trustee be attainted for treason, the king shall have his moiety or share to himself discharged from the trust. R. Lane, 54.

So, the king is supreme within his realm. *Vide Prærogative*, (D 17.)

The crown of *England* is an imperial crown. Dav. 61. a. by the *st.* 24 H. 8. 12.

By the *st.* 16 R. 2. 5. it was declared that the crown of *England* hath been so free at all times, that it hath been in no earthly subjection, but immediately subject to God touching the regality of the same crown, and to no other.

So, the dignity of the king continues, tho' he be in a foreign realm. 7 Co. 15. b. Calvin.

A felony or other offence in the king's palace, if he be at *Paris*; &c. shall be punished by the marshal of the *Marshalsea*. 7 Co. 15. b.

So, if a foreign king be in *England*, he shall be allowed the title and privilege of a king; for *suprema & infima dignitas est universalis*. 7 Co. 15. b.

And therefore he ought to sue, and shall be sued by the name of king; otherwise the writ abates. *Ibid.*

But a foreign king shall be subject to the laws here.

(E 1.) Council of the King.

THE king has several councils. Co. L. 110. a.

(E 2.) Privy Council.

For matters of state the king has his privy council. Co. L. 110. a.

(E 2.) *President of the council.*] By letters patent one has been constituted, from ancient times, president of the council *durante beneplacito*. 4 Inst. 55.

In the time of king *John* there was a president of the council. 4 Inst. 55.

And there was in several subsequent reigns, except in the time of queen *Elizabeth*. 4 Inst. 55.

By the *st.* 21 H. 8. 20. the president of the council shall be associate in all acts appointed by the statute to be done by the chancellor, treasurer; or privy seal; as, naming sheriffs, setting prices of wines, &c.

He ought to attend the king's person, to represent to him the affairs of the council. 4 Inst. 55.

(E 3.) *The residue of the council.*] The residue of the council consists of such a number as the king pleases. 4 Inst. 53.

And by the custom of the realm, upon summons to the council, and taking the oath of a privy counsellor, each of them continues of the council during the king's life without letters patent or other grant. 4 Inst. 54.

(E. 4.) *The duty of a privy counsellor.*] A privy counsellor by his oath is required, as far as discretion suffers, truly to counsel the king, in all matters treated in the council, or by him as the king's counsellor. 3 *Rush.* 967.

And in all things that may be for the king's honour and behoof, and to the good of his realm and subjects, without partiality, not leaving so to do for love, meed, doubt, or dread of any.

To keep secret the king's council, and all communed in council, without publishing it by word, writing, or otherwise, to any out of the council, or to any of the same council, if it touch him.

Nor, for gift, meed, or promise, to promote, favour, or hinder any matter treated or done in council.

To help with all his might the same council in all that shall be thought by it for the universal good of the king and his land, and the peace of the same.

To withstand any, of what degree soever, that shall attempt or intend the contrary.

And generally to do all a good and true counsellor ought to do to his sovereign. 4 *Inst.* 54.

They ought to consult of, and for the public good, the honour, safety, and profit of the realm. 4 *Inst.* 53.

Each of them ought to be expert, provident for the king, *parcus sui nec avidus alieni.* 4 *Inst.* 53.

[Offering money to a privy counsellor, to procure the reversion of an office in the colonies, of the gift of the crown, is a misdemeanor at common law, punishable by information, even tho' it is a saleable office. *Rex v. Vaughan*, or *Duke of Grafton's case*. *M.* 10 *Geo.* 3. 4 *B. M.* 2494.]

By the *st.* 12 & 13 *W.* 3. 2. after the limitation settled by this act takes effect, all resolutions taken in council shall be signed by such of the council as shall advise and consent to the same.

And all matters relating to the well governing of this kingdom, properly cognizable in the privy council by the laws and customs of this realm, shall be transacted there. But by the *st.* 4 & 5 *An.* 8. these clauses are repealed.

(E. 5.) *The power.*] The privy council may commit a criminal, as an incident. *Skin.* 597.

So, any of the privy council. *Semb.* 5 *Mod.* 81. *Skin.* 599.

So, a secretary of state. *Skin.* 598.

And the commitment may be to a messenger till examination, or for a little time till a removal to gaol. *Skin.* 599.

[Before 3 *Car.* 1. all privy counsellors exercised the power to commit; they then disused it, but still prescribed to commit *per mandatum regis*; but that first power was not warranted; they ought only to commit in council, not out of it. The *mandatum regis* is only his mandate in council. *Entick v. Carrington*, *M.* 6 *G.* 3. 2 *Wils.* 275.]

But by the *st.* 16 *Car.* 1. 10. the king or privy council have not jurisdiction, &c. by bill, petition, &c. to draw into question, determine, or dispose of the lands, tenements, goods, or chattels of any subject.

So, the privy council cannot lay an imposition, tallage, or charge upon the subject in any manner. 2 *Rob.* 174. l. 10. *Vide Parliament*, (H 9, &c.)

[The

[The king in council cannot decree *in personam* in England, (except in some criminal matters,) therefore cannot decree an agreement that is disputed. *Penn v. Ld. Baltimore, P. 1750, 1 Vesey, 444.*]

(F) The Queen.

(F 1.) The Privileges of a Queen Consort.

THE queen, consort of the king, is a person exempt by the common law, and has capacity to sue and be sued alone without the king. *Co. L. 133. a. Vide Action, (B 2.)*

So, she has capacity to take lands and tenements by grant to her from the king himself. *Co. L. 133. a. 2 Rol. 213. l. 20.*

So, she may make grants, and take estates by herself, without the king. *Co. L. 133. a. 2 Rol. 213. l. 30. 4 Co. 23. b.*

She may give a bond or other specialty. *2 Rol. 213. l. 25.*

So, the queen has privilege, that she shall not be amerced. *Co. L. 133. a.*

Nor, find pledges. *Co. L. 133. a.*

Nor, pay toll. *Co. L. 133. b.*

So, the queen has the disposition of her servants, exclusive of the king.

And therefore, if the king grants to another to be sadler to the queen, it will be void; for he ought to be a servant to the queen by her own grant. *Dub. 2 Rol. 213. l. 42.*

So, sometimes the king grants that she shall have the same remedy as the king for the recovery of her debts. *Mad. 247.*

(F 2.) *Aurum Reginae.*

So, by the common law, there is a duty to the queen consort, *procentem maris, una marca, de iis, qui sponte se obligant* to the king. *12 Co. 21.*

It is called the tenth part. *Blo. Nom. Verb. Queen Gold.*

And therefore, if a subject *sponte se obligat* to pay money to the king for licence to alien, or purchase in *mortmain*, this duty accrues to the queen. *R. 12 Co. 22.*

Or, for the grant of a fair, market, or other franchise, or liberty granted by the king *de novo*. *12 Co. 22.*

Or, for the restitution of liberties. *Mad. 240, 241.*

But it is not due upon a fine to the king by judgment, or for an alienation, or otherwise for money paid to the king by compulsion. *R. 12 Co. 21.*

Nor, for money paid to the king in consideration of a lease, or grant of possessions, or any revenue of the king. *R. 12 Co. 21.*

Nor, for money paid for the grant of a fair, market, waifs, &c. or other franchise *in esse*. *12 Co. 22.*

Nor, for money given by a subject to the king, *ex gratia*; for he is not bound to this. *R. 12 Co. 21.*

(F 3.) Queen Dowager.

The hospital of *St. Katherine* was founded by *Eleanor* dowager of *K. H. 3.* with reservation of the patronage *sibi & reginis succedentibus*; wherefore the queen dowager shall always have the nomination of a

master, when there is not a queen consort *in esse*. *R. Ca. Ch. 215. Skin. 15.*

So, tho' there be a queen consort. *Per Hale, Ca. Ch. 215.*

So, if a queen consort grants, it is not determined when she becomes dowager. *R. Skin. 15.*

(G) Issue of the King, the Prince.

THE eldest son and heir apparent of the king is called the prince, *quasi primus post regem. Dod. Noby, 9.*

King *Ed. 3.* by his charter 18 *Mart. 7 Ed. 3.* at *Pontefract*, created his son *Edward* the Black Prince (then but three years of age) *Comitem com. palat. Cestria habend. sibi & heredibus suis, regibus Anglia. 4 Inst. 244.*

By charter 17 *Mart. 11 Ed. 3.* he created him duke of *Cornwall*, *habend. eidem duci, & ipsius, & heredum suorum, regum Anglia, filiis primogenitis, & dicti loci ducibus in regno Anglia hereditarie successoris.* Which charter was established by authority of parliament. *R. 8 Co. The Prince's case, 16.*

By charter established by authority of parliament 17 *Ed. 3.* he created him *Principem Wallia, habend. sibi & heredibus suis, regibus Anglia, imperpetuum*, and invested him by a chaplet of gold, a gold ring, and a silver wand *juxta morem*, but now a golden wand is used. *4 Inst. 243.*

And therefore, every first-born son of such a king, as is heir to the Black Prince, immediately upon the advancement of his father to the crown, shall be duke of *Cornwall* in the life of his father, (to whom he is heir apparent,) without other creation. *R. 8 Co. The Prince's case, 16. b. 29. b.*

And shall have a fee-simple in such dukedom, and the possessions of the duchy, tho' it does not descend according to the rules of the common law. *R. 8 Co. The Prince's case, 27.*

And his wife shall be endowed. *8 Co. The Prince's case, 7.*

So, if the prince be created *Princeps Wallia*, or *Comes Cestria*, he has a fee-simple, tho' it be limited to him and his heirs, kings of *England*.

But the prince shall not be Prince of *Wales*, or Earl of *Chester*, till creation; for upon his death, or advancement to the crown, these dignities are merged and extinct in the crown. *4 Inst. 243. 1 Bul. 133.*

And the patent of creation shall be inrolled in *B. R. 1 Bul. 133.*

So, if the first-born son of the king dies in the life of his father, his first-born son shall not be Duke of *Cornwall* without a special creation, tho' he be heir apparent to the crown; for he is not the first-born son of a king of *England*. *R. 8 Co. 29, 30. The Prince's case.*

So, the first-born daughter of the king shall not be Duchess of *Cornwall*, tho' she be heir presumptive to the crown; for it must be a son. *R. 8 Co. 30. a. The Prince's case.*

So, if the king's eldest son dies, his second son, tho' he be heir apparent, shall not be Duke of *Cornwall*, without a special creation; for he was not the first-born son. *8 Co. 30. a. The Prince's case.*

The prince shall be immediately seised of the duchy of *Cornwall*, and all possessions belonging thereto.

But till a prince is born, the king is seised of all the possessions.

So,

So, if there be not a queen consort, or dowager, the king shall be seised of all their possessions. *R. Ca. Ch.* 215.

So, the king may present to an advowson, and his clerk continues after a prince is born. *Ca. Ch.* 215.

So, if he nominates the master of an hospital, &c. *R. Ca. Ch.* 215.

Yet, a lease for years by the king determines by the birth of a prince. *Ca. Ch.* 215.

The Prince of *Wales* had many privileges allowed him by the law.

The prince, as well as the king, has used to send letters to the *Exchequer*, for favour, or excuse to his attendants. *Mad.* 626.

So, a grant by the king to the prince does not make an alienation from the crown; for the land continues parcel of the crown. *Pal.* 89.

(H) Custos Regni.

(H 1.) How created.

IF the king be absent out of the realm, he by his letters patent may constitute one, or more, to be *custos regni* in his absence. 2 *Inst.* 26. 4 *Inst.* 6.

And he shall be called the *chief justicier*, or guardian of the realm: *Mad.* 21, 22.

(H 1.) The Authority of the *Custas*.

The chief justicier presides in all cases criminal and civil, and in the *Exchequer*. *Mad.* 21.

He holds pleas, lets the king's manors, &c. and makes allowances to accountants in the *Exchequer*. *Mad.* 135.

Such custos, or guardian, is *quasi prorex*. 2 *Inst.* 26.

And may summon a parliament in the king's absence. 2 *Inst.* 26. *Vide Parliament*, (E 1.)

But there ought to be a special commission to him to hold, and proceed in parliament. 4 *Inst.* 6.

The writ of summons to parliament shall be tested by him. 4 *Inst.* 6.

All original writs shall be tested by him. 2 *Inst.* 26.

By the *st.* 8 *H.* 5. 1. a parliament held by writ of summons from the guardian of the realm, when the king is abroad, shall not be dissolved by arrival of the king.

Assent of the King.

Vide Parliament, (L 42.)

King's Bench.

Vide Courts, (B 1, &c.)

King's Charter.

Vide Trade, (B—D 1)

King's Grant.

Vide Grant, (G 1, &c.)—*Ireland* (D).

King's Justices.

Vide Justices, (K 8.)

King's Protection.

Vide Abatement, (F 11.)

King's Tenant.

Vide Alienation, (A 1, 2.)

Vide more concerning the King, in Action, (B 1.—C 1.)—Administration, (B 3.)—Ancient Demesne, (C 1.)—Ann Four & Wast.—Assignment (D.)—Chafe, (A 1, 2.)—Condition, (A 3.)—Copyhold, (S 12.)—Dett, (G 1, &c.)—Dismes, (C 3.—E 3. 7.)—Ecclesiastical Persons (A.)—Esqglife, (H 5, 6. 8.)—Execution, (B 1, &c.)—Hospital (B C.)—Idiot, (C—D 4.)—Justices, (K 1, &c.)—Money, (B 5, &c.)—Officer, (K 10.)—Pardon (A.)—Parliament, (D 1.—F 1, 2.—G 10.—H 2. 4. 20. 24.—L 10. 34. 42.—R 8.)—Patent, (A—C 1, &c.)—Prerogative, per totum.—Prescription, (F 1.)—Tenure.—Viscount, (C 5.)—Visitor, (A 1.)—War, (B 1, &c.)

ROYAL MINES AND FISHES.

Vide Prerogative, (D 50.)

S A B B A T H.

Vide Temps, (B 3.)

S A C R A M E N T S.

(A) The Sacraments; how administered.

BY the *st. 1 Ed. 6. 1.* the blessed sacrament shall be ministered to the people in both kinds, except necessity otherwise require. Revived by the *st. 1 El. 1. f. 14.*

By the *st. 1 El. 2. and 13 & 14 Car. 2. 4.* all ministers, &c. shall administer both sacraments according to the order and form of the Book of Common Prayer, &c.

And by the *st. 1 El. 2.* all laws, &c. whereby other administration of sacraments is established, shall be void.

By the *st. 24 H. 8. 12.* all prelates, pastors, &c. shall minister sacraments, &c. to all subjects of the realm, notwithstanding citation, inhibition, &c. from the see of Rome, &c. and he who, by occasion of such inhibition, &c. refuses to administer them, shall have a year's imprisonment, and fine and ransom at the king's will.

(B) Divine Service.

BY the *st. 1 El. 2. and 13 & 14 Car. 2. 4.* all ministers in cathedral, parish church, or other place of public worship, (except a congregation

gregation tolerated by the *st.* 1 *W. & M.* 8.) shall be bound to use morning, evening, and all other public prayer, in the order and form prescribed by the Book of Common Prayer, &c. And all laws, whereby other service or common prayer is established, shall be void.

And by the *st.* 13 & 14 *Car.* 2. 4. *f.* 17. no other form shall be used.

By the *st.* 24 *H.* 8. 12. he who, by occasion of inhibition, citation, &c. from the see of Rome, &c. shall refuse to use divine service, &c. shall have a year's imprisonment, and fine and ransom at the king's will.

By the *st.* 1 *El.* 2. if any parson, vicar, &c. refuse to use the common prayer, or use other form, for the first offence he shall forfeit a year's profits of all his spiritual promotions, and six months imprisonment without bail; for the second offence shall be deprived and suffer a year's imprisonment; for the third offence shall be deprived and imprisoned for life.

But it is not sufficient to say, that he used *alias preces aut alio modo*, unless he used others in lieu of the common prayer. *R.* 3 *Mod.* 79.

(C) Who may administer.

BY the *st.* 13 & 14 *Car.* 2. 4. *f.* 14. no person, not having then episcopal ordination, shall administer the Lord's supper before he shall be ordained priest, according to the form prescribed by the Book of Common Prayer, on pain of 100 *l.*; a moiety to the king, of the other moiety, half to the poor, half to him that shall sue, &c.

(D) Remedy for not doing it.

BY the *st.* 1 *Ed.* 6. 1. the minister shall not, without lawful cause, deny the sacrament to any that desires it.

So, a parson cannot demand a fee for administering the sacraments; as, for a christening; for no fee can be due but by special custom. *1 Sal.* 332.

Nor, can it be due by custom, where the christening is in another parish. *Ibid.*

Or, at another place or chapel, by another person in the same parish. *R.* 1 *Sal.* 332.

By the *st.* 2 & 3 *Ed.* 6. 1. (revived upon the repeal of the *st.* 1 *Ma.* 2. made by the *st.* 1 *Jac.* 25.) and by the *st.* 1 *El.* 2. applied by the *st.* 13 & 14 *Car.* 2. 4. to the form then introduced, if any minister refuse to use the common prayer, or use open prayer or sacraments in other form, or preach or speak in derogation of it, for the first offence being convicted at the next sessions by verdict, confession, or notoriety of the fact, he shall lose a year's profit of all his spiritual promotions, and be imprisoned six months without bail; and if he have no spiritual promotion, twelve months; for the second offence shall be deprived *ipso facto* of spiritual promotions, and suffer a year's imprisonment, or having no spiritual promotions, during life; for the third offence shall be deprived and suffer imprisonment for life.

By the *st.* 13 & 14 *Car.* 2. 4. every minister, &c. in two months after promotion shall read and declare assent to the common prayer, or be *ipso facto* deprived of all ecclesiastical promotions.

And every incumbent, who, having a curate, shall not read the common prayer publicly once a month, being convicted on confession,

or oath of two witnesses before two justices of peace, forfeits for every offence 5*l.*; on non-payment in ten days, to be levied by distress and sale to the use of the poor. *Vide ante* (A—B).

(E) Penalty for Neglect of the Sacrament and of Divine Service.

By the *st.* 5 & 6 *Ed.* 6. 1. all persons shall resort (having no reasonable excuse) to the parish church or usual place of divine service on every *Sunday* and holiday, and there abide during common prayer, preaching, and other service, on pain of punishment by censures of the church.

By the *st.* 1 *El.* 2. he shall besides forfeit 12*d.* for every offence, to be levied by distress to the use of the poor; of which act justices of *oyer* and *terminer* and assise, and mayors, &c. of corporations have cognisance at the next sessions; and by the *st.* 23 *El.* 1. any justice of peace within a year and day after the offence.

By the *st.* 23 *El.* 1. he shall, over and above, forfeit 20*l.* for every month's absence; and on certificate in *B. R.* by the ordinary or a justice of peace, of a twelve month's absence, shall be bound to good behaviour with two sureties in 200*l.* till conformity. A third part of the penalty goes to the queen, a third to the poor, and a third to the informer; but on submission at the sessions at the trial for the first offence, he shall be discharged. But by the *st.* 29 *El.* 6. the conviction shall be only in *B. R.* or at the assizes; and by the *st.* 35 *El.* 1. the penalty shall be recovered by debt, &c. in *B. R.*, *C. B.*, or *Exchequer*; yet, by the *st.* 3 *Jac.* 4. justices of peace at sessions may inquire of all offences against former laws for not repairing to church.

By the *st.* 29 *El.* 6. and 3 *Jac.* 4. on an indictment at the assizes or sessions, for not repairing to church or sacrament, proclamation may be made that the party render himself to the sheriff by the next assizes or sessions, and if he appears not, his default shall be recorded, and there shall be judgment against him, as if convicted by verdict.

By the *st.* 3 *Jac.* 4. the 12*d.* for every *Sunday* may be levied by one justice on confession or oath, within a month after the fault, by distress and sale, and, for want of distress, by imprisonment till payment.

If there be a conviction upon the *st.* 29 *El.* 6. there shall be no information by an informer afterwards upon the *st.* 23 *El.* 1. *Lane*, 60.

By these statutes, if a person be convicted for a monthly absence from church, the conviction shall be certified into the *Exchequer*, and if he pay not, within *Easter* or *Michaelmas* term after, 20*l.* for every month in the indictment, and 20*l.* for every month after, without other indictment, until his conformity or death; process may go out of the *Exchequer* to seize all his goods and two parts of his lands and tenements.

And by the *st.* 3 *Jac.* 4. the king may either accept 20*l.* *per mensem*, or issue process against his goods, or two parts of his lands at pleasure.

By the *st.* 23 *El.* 1. of which justices of the peace may inquire, he who keeps a schoolmaster who resorts not to divine service for a month, or is not allowed by the bishop, forfeits 10*l.* *per mensem*, and such schoolmaster shall be disabled to teach youth, and suffer a year's imprisonment. And by the *st.* 1 *Jac.* 4. he who retains forfeits 40*s.* *per diem*.

By

By the *st.* 35 *El.* 1. (declared to be in force by the *st.* 16 *Car.* 2. 4.) if a person above sixteen, who hath without cause absented a month from church, persuade any other not to resort to divine service or communion, or to impugn the queen's authority he shall be committed without bail till he conform, and if he conform not in three months on request by the bishop, a justice of peace, or minister of the parish, shall at the assizes or quarter-sessions abjure the realm, and forfeit all his goods and lands during life; which abjuration at the sessions the justices shall certify to the assizes.

By the *st.* 3 *Jac.* 4. if any willingly keep or harbour in his house or service any servant or stranger, except parent or ward, who shall, without cause, forbear for a month together to resort to divine service, he shall forfeit 10*l.* *per mensem.*

But by the *st.* 1 *W. & M.* 18. the said statutes extend not to dissenters, who acknowledge the Trinity, and are not Popish recusants, who shall take the oaths of allegiance and supremacy, and subscribe the declaration in the *st.* 30 *Car.* 2. *st.* 2. or shall make the said declaration, and the declaration of fidelity and profession of belief there prescribed, which the justices of peace, at their quarter-sessions, shall administer and record, and who shall go to any open religious assembly allowed by that act.

A *feme-covert* is within the *st.* 1 *El.* & 23 *El.* and an information lies against the husband. *Dub. Sav.* 25. *R.* 2 *Cro.* 529.

But by the *st.* 7 *Jac.* 6. if she does not conform within three months after conviction, she shall be committed without bail by two justices, &c. till conformity, unless the husband pays 10*l.* *per month*, or a third part of all his lands at his election.

Yet, this *stat.* 7 *Jac.* is no excuse upon the other statutes. *R.* 2 *Cro.* 529.

If the information be for ten months, it is well, tho' an absence for a year be alleged. *R.* 2 *Cro.* 530.

The information may be in *C. B.* or *Exchequer*, since the *st.* 28 (or 29) *El.* 6. as well as in *B. R.* *Cont.* 11 *Co.* 60. b. 61 a. *R.* acc. *Hob.* 204.

(F) Profanation.

BY the *st.* 1 *Ed.* 6. 1. if any deprave or use contemptuous words of the sacrament, three justices of the peace (*quorum unus*) may take information by two witnesses within three months, bind him to the quarter-sessions, where he may be indicted, and, if convicted, suffer imprisonment, fine, and ransom, at the king's pleasure.

By the *st.* 2 & 3 *Ed.* 6. 1. and 1 *El.* 2. if any minister preach or speak in derogation of the common prayer, being convicted at the next sessions by verdict, confession, or notoriety of the fact, he shall for the first offence lose a year's profits of all his spiritual promotions, and be imprisoned six months without bail, and if he have no spiritual promotion, twelve months; for the second offence shall be deprived *ipso facto* of spiritual promotions, and suffer a year's imprisonment, or having no spiritual promotion, during life; for the third offence shall be deprived and suffer imprisonment for life.—And if any, by songs, &c. deprave or despise the Common Prayer Book, or cause any to use another form, or interrupt the using it, or the ministration of the sacraments, being convicted *ut supra*, for the first offence he shall forfeit

SACRAMENTS.

feit 100 marks, or on non-payment in six weeks be imprisoned six months without bail; for the second offence 400 marks, or on non-payment a year's imprisonment; for the third offence all his goods and chattels, and imprisonment for life.

As to profanation of the Sabbath, *vide in Temps*, (B 3.)

As to profanation by cursing and swearing, &c. *vide in Justices of Peace*, (B 23.)

Vide more concerning the Sacrament, in Officer, (K 7.)

SAFE CONDUCT.

Vide Admiralty, (E 8.)—*Prærogative*, (B 5.)

S A L E.

Vide Action on the Case for a Deceit, (A 8, 9.)—*Bargain and Sale*.—*Bienis*, (D 3.)—*Bye-Law*, (E 2.)—*Distress*, (D 7, 8, 9.)—*Market* (E).—*Parliament*, (H 5.)—*Popery*, (B 11.)—*Sewers*, (E 8, &c.)

Sale of Offices.

Vide Officer, (K 1.)—*Pleader*, (2 W 27.)

SANCTUARY.

Vide Abjuration (D).

SATISFACTION,

Vide Accord.

Of a Bond.

Vide Chancery (4 D 1. 20.—4 P).

SCANDALUM MAGNATUM.

Vide Action upon the Case for Defamation, (B 1, &c.)—*Libel*, (C 4.)

SCAVENGERS.

[A Scavenger's rate cannot be made by one liberty of a parish, where none of the churchwardens or overseers reside. *Rex v. Saint Leonard, Shoreditch*, T. 11 G. Fort. 324. *Str.* 630.]

[New parish cannot make scavenger's rate, but continues contributable to the old parish till a perpetual division is made as to the other rates. *Rex v. Saint John, Clerkenwell*, T. 11 G. Fort. 324.]

[Order to appoint scavengers, must set out that they are able persons, or it is bad. *Rex v. Justices of Middlesex*, M. 11 G. 2. *Antr.* 72.]

[Quarter-sessions have no power on appeal to make a new scavenger's rate, tho' they may quash the rate appealed from. *Rex v. Saint Andrew's, Holborn*, H. 4 G. 3. 3 B. M. 1458.]

S C I E N T E R.

Vide Action on the Case for Deceit, (F 3.)

S C I R E F A C I A S.

Vide Bail, (R 1, &c.)—Dismes, (M 8.)—Execution, (A 4.—I 4.)—Fine, (E 15.)—Officer, (K 14.)—Patent, (F 4, &c.)—Pleader, (3 B 17.—3 L 1, &c.)—Prærogative, (D 69.)

S C H O O L S A N D S C H O O L M A S T E R.

Vide University (D).—Uses, (N 3.)

S C O T L A N D.

(A) Scotland; the Antiquity of it.

SCOTLAND is another kingdom of itself, distinct from the kingdom of *England*. *Pl. Com.* 376. a.

(B) Berwick.

BERWICK was antiently part of *Scotland*.

And tho' it was annexed to *England* in the time of *Ed. 4.* yet it shall be governed by the laws of *Scotland* and the customs there, *1 Sid.* 382.

And therefore a fine or ejectment cannot be in the courts of *Westminster* for land in *Berwick*. *1 Sid.* 382.

[*Berwick* has no criminal law but the law of *England*, nor jurisdiction in criminal matters, but with such reference to it as includes *B. R.*]

[*Venire* does not run there, because they are exempted from being summoned out of the borough to serve on juries.]

[Original writs do not run there.]

[Other writs, ministerially directed, do.]

[Writs, not ministerially directed, *mandamus*, prohibition, *habeas corpus*, *certiorari*, run there.]

[Informations may be granted by *B. R.* or filed by attorney-general.]

[Where *B. R.* has jurisdiction of the matter, and it cannot be tried in the place, it shall be tried as near as may be; thus, with regard to *Berwick*, it shall be tried in *Northumberland*, and that on a suggestion, that *venire* does not run there, and they are exempted from serving juries out of the borough.]

[All rules of common law, that hold as to *Wales*, conclude *a fortiori* to *Berwick*.]

[Before the union, *Berwick* was bound by *English* general acts of parliament, without being named, which, when done, is superfluous; it is now bound by all general laws. *Rex v. Cowle*, *T.* 32 & 33 *G.* 2. 2 *B. M.* 834.]

(C) How dependent upon *England*.

BUT *Scotland* was held of the king of *England*. *Pl. Com.* 368. b.
 And is within the fee and feignory of the king of *England*. *Ibid.*
 Yet *Scotland* is a distinct kingdom.
 And therefore a fine and non-claim do not bar him who was in
Scotland. *Pl. Com.* 376. a.

(D 1.) How united to it.

BY the *st.* 1 *Jac.* 1. the parliament congratulates the famous union, or rather re-uniting of two mighty famous and antient kingdoms (yet antiently but one) under one Imperial crown, &c.

By the *st.* 1 *Jac.* 1. 2. commissioners were appointed to treat with commissioners to be appointed by the parliament of *Scotland* for a further union between the said kingdoms of *England* and *Scotland*.

By the *st.* 3 *Jac.* 1. 3. the effect and result of such treaty was prolonged from being laid before the houses of parliament till some subsequent session of the same parliament.

And in pursuance of the same treaty, by the *st.* 4 *Jac.* 1. the hostile laws made in either of the kingdoms were to be repealed, and regulations were made for trial of offenders in each kingdom.

By the *st.* 22 *Car.* 2. 9. the king was empowered to nominate commissioners to treat of an union of both kingdoms.

By the *st.* 3 & 4 *Ann.* 7. commissioners, to be appointed by her majesty, may meet commissioners to be appointed by the parliament of *Scotland*, to treat of an union of both kingdoms, and such other matters as they shall think convenient for the common good of both, who shall reduce their proceedings into writing, to be laid before the queen, and the parliaments of *England* and *Scotland*, &c.

22 *July*, 5 *Ann.* the commissioners of both kingdoms agreed on twenty-five articles of union.

By the *st.* 5 *Ann.* 8. reciting the said articles, which, with some additions and explanations, had been confirmed by statute in *Scotland*, 16 *January*, 5 *Ann.* and reciting an act passed in *Scotland* for securing the protestant religion and presbyterian church government, and an act in *England*, 5 *Ann.* 5. for securing the church of *England*, as by law established, the said articles as confirmed by the parliament of *Scotland*, and the said two acts are enacted to be the complete and entire union of the said two kingdoms of *England* and *Scotland*; and by the said statute an act passed in *Scotland* for settling the manner of electing sixteen peers and forty-five members for the representing *Scotland* in the parliament of *Great Britain*, is declared to be as valid as if it had been part of the articles of union.

(D) The Effects of the Union.

(D 2.) In respect of the Crown.

BY art. 1. on 1st *May* 1707, and for ever after, the two kingdoms of *England* and *Scotland* shall be united into one kingdom by the name of *Great Britain*.

The ensigns armorial shall be as the queen appoints, and the crosses of *St. Andrew* and *St. George* conjoined and used in all flags, banners, &c. at sea and land.

By

By *art. 24.* there shall be one great seal for the united kingdom, different from that of either kingdom; but the quartering the arms, and precedency of *Lyon* king of arms, shall be left to her majesty.

Such great seal shall be used for writs of election, treaties, orders of state, &c. which concern the whole kingdom of *England*, and the seal in *Scotland* shall be for the private rights and grants of *Scotland*.

By *art. 2.* the succession to the monarchy of the united kingdom shall be as settled by the *st. 12 W. 3. 2.* for want of issue of her majesty, to the princess *Sophia* and the heirs of her body, being protestants, &c.

And all papists, or marrying papists, shall be excluded, as by the *st. 1 W. & M. sess. 2. c. 2.*

By *art. 16.* the coin shall be of the same standard and value through the united kingdom, as now in *England*.

By *art. 24.* privy seal, signet, cassel, signet of justiciary court, quarter seals, and seals of court, now used, shall be continued, subject to the regulations of parliament.

And the crown, sceptre, sword of state, and all records, &c. public or private, shall be kept in *Scotland*, &c.

(D 3.) Of Religion.

By the *st. 16 January, 5 Ann.* in *Scotland*, confirmed by the *st. 5 Ann. 8.* and declared to be a fundamental and essential part of the union, the true protestant religion, and the worship, discipline, and government of the church of *Scotland* is established to continue without any alteration for ever, especially the *5th act, 1 W. & M.* ratifying the confession of faith, and settling the presbyterian church government, and all other acts relating thereto, in prosecution of the claim of right, 11 April 1689.

And the true protestant religion contained in the said confession of faith, with the form and purity of worship presently in use in the said church, and its presbyterian church government and discipline, viz. the government of the church by kirk sessions, presbyteries, provincial synods, and general assemblies, all established by the said acts pursuant to the claim of right, shall continue unalterable; and the said presbyterian government shall be the only government of the church in the said kingdom of *Scotland*.

And the universities and colleges of *St. Andrew's, Glasgow, Aberdeen, and Edinburgh*, as now established by law, shall continue for ever; and no professors, principals, &c. or others, bearing office in any university, college, or school, shall be capable, &c. but such as own the civil government, and before their admission profess and subscribe the said confession, and conform to the worship presently in use, and submit to the government and discipline thereof, and never endeavour the subversion or prejudice thereof directly or indirectly, &c.

And no subject, &c. shall be liable to any oath, test, or subscription, contrary to the said true protestant religion, church government, worship or discipline; and the successor to the crown shall swear to maintain, &c. the same inviolably.

(D 4.) Parliament.

(D 4.) *Election of peers.* By *art. 3.* the united kingdom of *Great Britain* shall be represented by one and the same parliament.

By

By *art. 22.* of the peers of *Scotland*, sixteen shall be the number to sit in the House of Lords; and, upon her majesty's pleasure, to hold any parliament of *Great Britain*, till further provision by the parliament of *Great Britain*, a writ shall issue to the privy council of *Scotland*, under the great seal, to cause sixteen peers to be summoned, and forty-five members, &c. elected, &c. And the names of the persons so summoned and elected shall be returned by the said privy council into the court from whence the writ issued.

By the *st. 6 Ann. 23.* the proclamation shall be under the great seal of *Great Britain*, commanding all peers to meet, &c. and such proclamation shall be published at *Edinburgh*, and all the county towns in *Scotland*, twenty-five days before the time of meeting.

By the *st. in Scotland, 5 Feb. 1707*, the said writ shall contain a warrant to the privy council, requiring them to issue a proclamation to the peers of *Scotland* to meet at such time and place in *Scotland*, as her majesty thinks fit, to elect the said sixteen peers, and requiring the lord clerk-register, or two of the clerks of session, to attend and administer the oaths required, and ask the votes, and, having made up the lists in the presence of the meeting, to return the names of the sixteen peers chosen (under the subscription of the lord clerk-register, clerk, or clerks attending) to the clerk of the privy council.

And by the same statute, the said sixteen peers shall be named by the peers of *Scotland* out of their own number by open election and plurality of voices of peers present, and proxies for the absent (the said proxies being peers, and producing a mandate signed before witnesses, and both constituent and proxy being qualified by law).

And such absent peers may send lists of the peers by them thought fit validly signed, &c. which shall be reckoned as if they had been present and given in such list.

In case of death of any such peer, &c. they shall nominate another in like manner.

By *art. 23.* the said sixteen peers shall have all privileges of parliament, as peers of *England* have, or shall have, particularly the right of sitting on trials of peers during the being, or in the intervals of parliament.

By the *st. 6 Ann. 23.* peers of *Scotland*, before qualified to elect the sixteen peers, shall take the oaths and subscribe the declaration, &c. And if absent, there shall be a certificate thereof, &c.

Peers, who are also of *England*, shall sign their proxies and lists, as peers of *Scotland*; and no peer shall be capable of more than two proxies at a time.

After the election, the lord clerk-register, &c. shall certify the names of the sixteen peers elected to the *Chancery of Great Britain*.

(D 5.) *Of the Commons.*] So, by *art. 22.* the representatives of *Scotland* in the House of Commons of parliament in *Great Britain* shall be forty-five.

And by the *st. in Scotland, 5 Feb. 1707*, on writ to the privy council, &c. they shall issue a proclamation *ut supra*, requiring also the freeholders, for the respective shires and stewarties, to elect their commissioners, and *Edinburgh* and the other royal burghs to elect the commissioners to be sent to the several districts, &c.

But by the *st. 6 Ann. 6.* there shall be a writ to the sheriff, &c. who shall

shall make his precept to the borough of *Edinburgh*, and the other burghs, &c.

And by the statute in *Scotland*, 5 Feb. 1707, of the forty-five representatives of the commons, thirty shall be chosen by the shires and stewartries, each one, (except *Caithness*, which shall chuse by turn with *Bute*, *Cromarty* with *Nairn*, *Kinross* with *Clackmanan*,) and fifteen for the royal boroughs, viz. *Edinburgh* one, and the rest shall be divided into fourteen classes or districts, and each burgh chusing a commissioner, those commissioners shall elect one for each district, &c.

If the votes of the commissioners in any district be equal, the presiding commissioner (for the burghs shall preside by turns in every district) shall have the casting vote, &c.

On death or vacancy, the same shire or district shall chuse another in the same manner, &c.

None shall be capable to elect or be elected, unless he be of the age of twenty-one years complete, and a protestant, and, if required, subscribe and swear the formula in the third act of the 8th and 9th session of W. 3. intituled, *An Act to prevent the Growth of Popery*.

Nor, unless now by the laws of this kingdom capable to elect or be elected a commissioner to the parliament of *Scotland*.

By art. 22. every peer and member shall take the oaths appointed by the st. 1 W. & M. st. 1. c. 8. and 1 Ann. st. 1. c. 22. and subscribe the declaration by the st. 30 Car. 2. st. 2. in the same manner and under the same penalties, as members of both houses of parliament in *England*.

By the st. 6 Ann. 23. vpter, before the election of burgeses or commissioner, &c. shall, if required, take the oaths, or, if a Quaker, the affirmation.

(D 6.) Peerage, &c.

By art. 23. all peers of *Scotland* shall be peers of *Great Britain*, and have precedency next after peers of like degrees in *England*, and before all of like degrees after to be created, and shall be tried as peers, except that of sitting in the House of Lords, and the privileges depending thereon, and particularly the right of sitting on the trials of peers.

By the st. 6 Ann. 23. for the trial of a peer for treason or felony, a commission shall go to the justices to inquire by oaths, &c. of all treasons, felonies, &c. committed in such county by the peer, &c. who shall take inquisition in the same manner, which shall be of the same effect, and proceeded on in the like method, as an indictment before justices of oyer and terminer for the like offence.

By art. 20. all offices, jurisdictions, &c. heritable, or for life, shall be reserved to the owners as rights of property.

By art. 21. the rights and privileges of the royal burghs shall remain intire after the union.

By art. 19. the privy council in *Scotland* was to continue till the parliament established a more effectual method, &c.

By the st. 6 Ann. 6. the queen shall have but one privy council for *Great Britain*, &c. but justices of peace shall be for every shire, stewartry, and such cities, burghs, &c. as the queen thinks fit, who shall have the same power as to peace, as by the laws of *Scotland* justices of peace had or have by the laws of *England*.

(D 7.) Trade.

By art. 4. all subjects of the united kingdom shall have full freedom and intercourse of trade and navigation to and from any place in the same kingdom and the dominions belonging thereto.

And there shall be a communication of all other rights and privileges, which belong to subjects of either kingdom, &c.

[But statutes allowing certain privileges to the members of the universities, do not extend to the *Scotch* universities, unless it be so expressed. 1 T. R. 49.]

[And therefore a diploma conferring the degree of doctor of physic, granted by any of the universities of *Scotland*, does not give a qualification to the eldest son of such graduate to kill game under 22 & 23 Car. 2. c. 25. *Id. ibid.*]

By art. 5. all ships, &c. of subjects of *Scotland*, at the union, tho' foreign built, shall be deemed of the built of *England*.

By art. 6. all parts of the united kingdom shall be under the same prohibitions, restrictions, and regulations of trade, have the same allowances, encouragements, and drawbacks, and be liable to the same customs and duties on import and export; and the prohibitions, &c. allowances, &c. and customs, &c. settled in *England* at the union, shall after take place through the whole united kingdom, except the duties on export and import of particular commodities, from which any subjects of either kingdom are exempt by their private rights, which shall remain intire, &c.

[*Scotch* manufactures may be vended in *England*, by wholesale, without any licence from the hawkers' office. 1 Bl. Rep. 364.]

No *Scotch* cattle carried into *England* shall be liable to other duties than the cattle of *England* are.

When oats are at 15 s. sterling per quarter, or under, 2 s. 6 d. per quarter shall be paid for oatmeal exported, as long as rewards are allowed for the exportation of other grain, and the beer of *Scotland* shall have the same reward as barley.

And the prohibition in *Scotland* of importation of victuals from *Ireland*, or other place beyond sea, shall remain, till more effectual provision against such importation.

By art. 8. foreign salt imported in *Scotland* shall be charged with the same duties as in *England*, and so shall salt made in *Scotland*, if used for flesh exported, or provisions of ships, &c.

And the laws in *Scotland* for curing, &c. herring, white-fish, and salmon with foreign salt only, &c. shall be continued, subject to alterations by the parliament of *Great Britain*, and fish so cured, &c. exported from *Scotland*, shall have the same premiums and drawbacks as from *England*.

And there shall be allowed 10 s. 5 d. per barrel for white herring, and 5 s. per barrel for beef and pork, salted with foreign salt, exported from *Scotland* beyond sea.

By art. 17. the same weights and measures shall be used through the united kingdom as now in *England*, and standards shall be sent from those kept at the Exchequer at *Westminster* to be kept by those burghs in *Scotland* which have now of right the keeping of such standards, subject to regulations by parliament.

(D 8.) Taxes.

By *art. 7.* all parts of the united kingdom shall be for ever liable to the same excises on all exciseable liquors, except that thirty-four gallons barrel of beer and ale *English*, being twelve gallons *Scots* present measure, shall pay but 2*s.* on the account of the present excise, which after the union shall take place on all other liquors as settled in *England*.

But by *art. 9.* when the land-tax in *England* is 1,997,763*l.* 8*s.* 4½*d.*, *Scotland's* quota shall be 48,000*l.* free of all charges; and so proportionably, to be collected as the *cess* now in *Scotland*.

And by *art. 8.* *Scotland* shall be exempt from the duty on home-made salt for seven years, and after from the duty by the *ft. 9 & 10 W. 3.* of 2*s.* 4*d.* per bushel, but shall pay if imported into *England*. *Vide 3 Geo. 2. c. 20. sect. 3.*

So, by *art. 10.* from duties on stamp paper, vellum, and parchment, by the acts then in force.

By *art. 11.* from duties on windows and lights, which determine 1st *August* 1710.

By *art. 12.* from duties on coals, culm, and cinders, used in *Scotland* till 3d *September* 1710.

By *art. 13.* from duty on malt till 24th *June* 1707; and by *art. 14.* during the present war.

By *art. 14.* from all other duties laid on before the union, except those consented to in this treaty.

So, by *art. 15.* *Scotland* shall have 398,085*l.* 10*s.* as an equivalent for the customs and excises with which *Scotland* after the union will be liable towards the debts of *England*, (the customs of *Scotland* being 30,000*l.* per annum, and those of *England* 1,341,559*l.* per annum, the excises in *Scotland* 33,500*l.* per annum, and those in *England* 947,602*l.* per annum,) to be applied, &c.

(D 9.) Laws.

By *art. 25.* all laws and statutes in either kingdom, so far as they are inconsistent with any article of the union, shall cease and be void.

By *art. 18.* laws about the regulation of trade, customs and excises, to which *Scotland* is liable, shall be the same in *Scotland* as in *England*.

But by the same *art.* all laws in *Scotland*, not inconsistent with the treaty of union, shall remain in the same force as before, but alterable by the parliament of *Great Britain*.

And the laws which concern public right, policy, and civil government, may be made the same through the united kingdom, but no alteration shall be in laws which concern private right, except for evident utility of the subjects of *Scotland*.

[The statute of limitations extends to bar plaintiffs resident in *Scotland*. 1 *Bl. Rep.* 286.]

[If money is left in trust to be laid out in lands in *England* for *A.*, &c. and by act of parliament it is secured on *A.*'s estate in *Scotland*, during his minority, it is to be considered as an estate in *England*. *Marquis of Annandale v. Marchioness of Annandale*, T. 1751, 2 *Vesey*, 381.]

[The purchase-money for heritable jurisdictions, whilst remaining in the Exchequer in *England*, considered as real estate in *Scotland*. *Ibid.*]

[By *stat. 13 G. 3. c. 31.* persons against whom warrants are issued by justices in *England* for offences, who shall escape into *Scotland*, may be sent back by *Scotch* justice to the county where offence committed; and so, *vice versa*, from *England* to *Scotland*.]

[Person stealing in *Scotland* may be tried where he is found with the goods in *England*, and *vice versa*; and so receivers of stolen goods.]

(D 10.) Courts.

(D 10.) *Court of Sessions.*] By *art. 19.* the court of session, or college of justice, shall remain in all time coming in *Scotland*, as now constituted, and with the same authority and privileges, subject to such regulations for the better administration of justice as shall be made by the parliament of *Great Britain*.

None shall be named ordinary lords of session but those who have served five years in the college of justice, as advocates or principal clerks of session, or ten years as writer to the signet, &c. so as the qualification for ordinary lords of session may be altered by parliament.

By the *st. 6 Ann. 6.* circuit courts shall be twice a-year, as by the *st. in 2d sess. Car. 2. 3.*

(D 11.) *Of Justiciary.*] So, by *art. 19.* the court of justiciary shall remain in all time, &c. subject to regulations, &c. without prejudice to other rights of justiciary.

(D 12.) *Of Admiralty.*] By *art. 19.* all Admiralty jurisdictions shall be under the lord admiral or commissioners of Admiralty in *Great Britain*.

But the court of Admiralty now in *Scotland* shall be continued, and all reviews, reductions, or suspensions of sentences in *maritime* causes, till the parliament of *Great Britain* make regulations as expedient for the whole united kingdom, so as in *Scotland* be always a court of Admiralty for determining all *maritime* causes relating to private rights in *Scotland*.

And the heritable rights of Admiralty and Vice-Admiralty in *Scotland* shall be reserved to the proprietors as rights of property, subject, the manner of exercising, to the regulations of parliament.

(D 13.) *Other courts.*] By *art. 19.* all other courts in *Scotland* shall remain subject to alterations by parliament.

And all inferior courts there remain subordinate, as now, to the supreme courts of justice there; and no causes in *Scotland* shall be cognoscible in *Chancery*, *B. R.*, *C. B.*, or other court in *Westminster-Hall*, nor shall they, or any court of the like nature, have power to review the sentences, &c. in *Scotland*, or stop the execution of the same.

(D 14.) *Exchequer.*] By *art. 19.* the court of *Exchequer* shall be in *Scotland*, having the same power as in *England* for deciding questions about the revenues of customs and excises there.

And shall have the same power as the present court of *Exchequer* in *Scotland* of passing signatures, gifts, tutories, &c.

By the *stat. 6 Ann. 26.* (till which by *art. 19.* the *Exchequer* before in Scotland continued) a court of *Exchequer* was erected in Scotland.

[Whether the court of *Exchequer* has the exclusive jurisdiction concerning the revenue arising there (as on a bond to pay duties)? *Qu. Attorney-General v. Lutwydye, H. 1729, Bunb. 280.*]

S E A.

Vide Admiralty per totum.—Navigation (A B).—Prerogative, (B 1.)

S E A L.

Vide Fait, (A 2.—F 2.)—*Process,* (A 3.)

The King's Seals.

Vide Justices, (K 6.)—*Patent,* (C 1, &c.)

SEARCH AND SEIZURE OF FORFEITED GOODS.

Vide Trade, (C 6.)

SEAT IN A CHURCH.

Vide Action on the Case for a Disturbance, (A 3.)—*Esglise,* (G 3.)

SECRETARY OF STATE.

Vide Officer, (E 8.)

SECTA AD MOLENDINUM.

Vide Droit (H).

SE DEFENDENDO.

Vide Justices, (M 18.)

SEIGNIORY.

(A) Seigniori: What shall be: How created: *In Capite.*

SEIGNIORY imports the dominion or royalty which any one has. And it is a seigniori in gross, where the dominion is founded in his person; as, where a man holds of the king *in capite*, or of a common person in gross. *Co. L. 108. a. 12 Co. 136. Hob. 90.*

Or, when he has a royalty in respect of an honour, manor, &c.; of which, *vide Honour.*

If the king creates a tenure of himself, without saying of any manor, castle, honour, &c. it will be a tenure *in capite*, for he holds of him as of his crown. *Co. L. 108. a. 12 Co. 135. Sav. 45.*

Tho' the tenure be in *scage*, and not in *chivalry.* *Co. L. 108. a.*

But where a subject creates the tenure, tho' the feignory afterwards escheats, &c. to the king, it will be a tenure of the person of the king, but not *in capite*. *Co. L. 108. a.*

So, if the tenure be created by the king *ut de manerio*, &c. *in capite*, the tenure will be of the manor, and the words *in capite* shall be rejected. *R. 12 Co. 136.*

The king is lord paramount of all the lands in the kingdom. *2 Inst. 501. Vide Homage.*

So, before the *st. W. 3. 18 Ed. 1. 1. quia emptores terrarum*, if a subject had enfeoffed, &c. another to hold of himself by such services as he pleases, it was a *mesne* feignory in the feoffor. *2 Inst. 501.*

And if he had enfeoffed another generally, without mention of any tenure, the feoffee held of him by the same services by which he held. *2 Inst. 501.*

So, since the *st. quia emptores*, if a tenant makes a gift in tail, the donee holds of the donor. *4 H. 6. 20.*

Tho' the gift be *tenend. de capitali domino*; for these words shall be rejected. *R. 4 H. 6. 20, 21.*

If the tenant had enfeoffed another only of part of his tenement, he must hold of his feoffor; for the feignory cannot be divided by the act of the tenant, and therefore there could not be a feoffment of parcel to hold of the lord paramount. *2 Inst. 65.*

Yet before the *st. quia emptores*, the tenant might enfeoff another of the whole, to hold of the lord paramount. *2 Inst. 65.*

But by the *st. quia emptores terrarum*, if any enfeoff another of his tenements, or any part of them, the feoffee shall hold of the lord paramount by the same services by which his feoffor held, or *pro rata*, if the feoffment be only of part. *2 Inst. 501.*

The tenure shall be of the next lord paramount. *Ibid.*

And by the same services, by which the feoffor ought to hold, if he was seised of the fee, or in his own right. *2 Inst. 502.*

Or, (if it cannot be by the same, as where the feoffor holds in *frankalmoigne*,) as near as it can. *2 Inst. 502.*

(B) How extinguished.

BUT if the tenant enfeoffs the king, the feignory is extinct; for the king cannot hold of any person. *Dy. 10. a.*

So, if he gives to *A.* in tail, the remainder to the king in fee, if the king accepts the remainder. *R. Dy. 154. b.*

So, if tenant *paravail* enfeoffs the lord paramount, the *mesnalty* will be extinct, for the lord paramount cannot hold of any person more base. *Dy. 10. a.*

So, if a tenancy descends to the king and another, the king may compel the other to do the entire service or not, at his election. *R. Dy. 285. b.*

But if the king afterwards enfeoffs another *tenend. de capitali domino per servitia debita*, the *mesnalty* and feignory paramount are revived. *2 Inst. 501.*

So, if the lord releases the feignory to the tenant, or releases the land, the feignory is extinct. *Lit. f. 454.*

So, if the lord paramount confirms the estate of the *mesne*, to hold by

by *socage*, or a less service, the tenant *paravail*, who holds by the same services, after such confirmation shall hold by *socage*, &c. 2 *Inst.* 501.

Vide more concerning *Seignior*y, in *Grant*, (E 4.)

SEISED TO USES.

Vide Uses (E—F).

SEISIN.

(A) Seisin in Fact.

(A 1.) When necessary.

SEISIN imports the having possession of an estate of freehold or inheritance in lands or tenements. *Co. L.* 153. *a.*

Seisin is in fact or in law. *Co. L.* 29. *a.*

Seisin in fact is necessary to make a man tenant by the curtesy, where it was attainable. *Co. L.* 29. *a.* *Vide Estates*, (D 1.)

And to maintain an assise. 4 *Co.* 9. *a.* *Vide post.* (C).

Or, a writ of right. 4 *Co.* 9. *a.*

So, a writ of *aiel*, *mortd'ancestor*, &c. 4 *Co.* 10. *a.*

And therefore where the *st.* 32 *H.* 8. 2. speaks of seisin within sixty years for a writ of right, fifty years for a writ of *aiel*, *cofsnage*, *mortd'ancestor*, entry, &c. within thirty years for an *assise*, it shall be intended of an actual seisin. 4 *Co.* 10. *a.*

(A 2.) What shall be a Seisin in Fact.

A seisin in fact shall be attained by an actual entry into lands or tenements.

By an entry into part in the name of the whole.

So, a receipt of rents or profits will give an actual seisin.

So, if an heir demises for years, or at will, the entry of the lessee gives an actual seisin to the lessor. *Vide Assise*, (B 4).

So, a recovery and execution thereon give an actual seisin. *Vide post.* (C).

[*A.* dies seised of four houses leaving daughters by his first wife, and his second wife *ensent* with a son who is born, lives five weeks and dies; the mother, the daughters, and the son, live in one of the houses, the tenants of the other houses pay rent to the mother before the birth, during the life, and after the death of the son. This is actual seisin in the son, and the premises descend to his heir. *Goodtitle v. Newman*, *H.* 14 *G.* 3. 3 *Wilf.* 516.]

(B) Seisin in Law.

When sufficient.

A Seisin in law is sufficient for an avowry upon a distress. 4 *Co.* 9. *a.* *Vide post.* (E).

(C) What Seisin is sufficient to maintain an Assise.

THE plaintiff in an assise must have actual seisin of the lands or tenements for which he brings his assise; for it does not lie of a seisin in law. *Lit. f.* 681. *4 Co.* 9. *a.*

What shall be an actual seisin, *vide ante*, (A 2.)

And therefore, if the plaintiff in an assise enters, or takes the profits of the land, that is sufficient for him to have an assise.

So, if a man receives rent, that is a sufficient seisin to have an assise of the rent.

So, if a man recovers rent, and the sheriff upon a writ of execution puts him in seisin of the rent.

Tho' he puts him in seisin only by *parol* upon the land. *2 Rol.* 463. *l.* 40.

Or, by delivery of an ox, or other collateral thing in the name of seisin, *2 Rol.* 464. *l.* 30. 463. *l.* 30. 32.

So, if he has judgment for a return irreplevifable. *4 Co.* 9. *b.* *2 Rol.* 464. *l.* 12.

So, if the tenant, upon a grant of rent, attorns to the grantee, and gives him money as parcel of the rent, that will be a sufficient seisin, *2 Rol.* 463. *l.* 22.

So, if he gives a penny, &c. by way of seisin, tho' it be not given as parcel of the rent. *2 Rol.* 463. *l.* 25. *4 Co.* 10. *a.*

Or, gives an ox, cow, or other collateral thing, in the name of seisin. *2 Rol.* 463. *l.* 27. 464. *l.* 25.

So, if a man takes the profits of an office, that is a sufficient seisin of the office to maintain an assise.

So, if he takes 3*d.* of *A.* for a *capias*, it is a sufficient seisin of the office of filazer. *1 Rol.* 270. *l.* 25.

So, if he takes 20*s.* of *A.* by way of composition for the fees of an office. *R.* *2 Lev.* 120.

Tho' the defendant had possession of the office at the same time. *2 Lev.* 120.

So, if he puts his hand upon the mace, which the disseisor of the office holds, and his hand upon the door of the House of Commons, it is a sufficient seisin of the office of serjeant of the House of Commons. *R.* *2 Lev.* 120.

So, if he recovers damages in an action upon the case for his fees, *Dub.* *2 Lev.* 108.

So, seisin of part of the rent is seisin sufficient to have an assise of the whole. *4 Co.* 9. *2 Rol.* 463. *l.* 50.

So, if a man grants several rents, an attornment by delivery of a penny in the name of seisin is sufficient for all the rents. *2 Rol.* 463. *l.* 35. *4 Co.* 8. *b.* 9. *b.*

So, if a man reserves upon a lease for life or years, a quartern of corn for the first year, and afterwards 50*s.* *per annum*, the seisin of the corn is sufficient for the 50*s.* rent; for the whole stands upon the same reservation. *4 Co.* 9. *a.*

So, seisin by the ancestor is sufficient in an assise by the heir. *Vide Assise* (A).

So, in an assise of rent by a corporation sole, seisin by his predecessor. *2 Rol.* 464. *l.* 5. 40.

So, seisin by the hand of the tenant paravail is sufficient for the lord *paramount* against the *mesne*. *1 Rol.* 314. *l.* 47.

So,

So, seisin by the husband binds the wife and her heirs. 1 *Rol.* 314.

l. 55.

So, seisin by tenant by the curtesy binds the heir. 1 *Rol.* 315. *l.* 2.

So, seisin given of services by *A.* after a feoffment by him to *B.* and before notice of the feoffment, is sufficient for the lord in an assise against *B.*, for till notice *A.* was his tenant, as to the avowry. 2 *Rol.* 464. *l.* 50.

So, seisin by the hand of the discontinuee of tenant in tail, tho' the lord cannot avow upon him, and there is no privity between them. 2 *Rol.* 464. *l.* 52. 1 *Rol.* 314. *l.* 51.

So, by the hand of a disseisor, or other, who has a defeasible title, if it be without *covin.* 2 *Rol.* 464. *l.* 45. 1 *Rol.* 314. *l.* 50.

If a man makes a feoffment of a feignory upon condition, and afterwards enters for the condition broken; seisin of the services before the feoffment is sufficient for an assise after re-rent. 2 *Rol.* 465. *l.* 10: where, after re-entry, he distrains. 4 *Co.* 9. *b.* *Vide post.* (D).

So, seisin by the feoffee before the condition broken. 4 *Co.* 9. *b.*

If a rent becomes seck without the act of the party himself, seisin before is sufficient for an assise afterwards; as, if the lord purchases, &c. of the tenant *paravail*, whereby the surplusage of the rent of the *mesnalty* is seck, seisin before of the rent-service is sufficient for that which is seck. 4 *Co.* 9. *a.*

(D) What not.

BUT a seisin in law is not a sufficient seisin to have an assise. *Vide ante* (C).

So, an attornment to the grant of a rent, without payment of any part, or something given in the name of seisin, is not sufficient to maintain an assise. 2 *Rol.* 463. *l.* 15. 464. *l.* 20.

Tho' he attorned by delivery of a penny, if it were not given as part of rent, or in the name of seisin. 2 *Rol.* 463. *l.* 20.

So, a distress for a rent-seck, without more, is not a sufficient seisin to have an assise. 2 *Rol.* 463. *l.* 43.

So, seisin of one service is not sufficient to have an assise of another service, tho' it be inferior to it. 4 *Co.* 9. *a.*

As, seisin of fealty is not sufficient to have an assise for rent. 2 *Rol.* 463. *l.* 52.

So, in an assise for an office, it is not sufficient for a seisin, that he goes to the place where it ought to be exercised, and demands his station there. 2 *Lev.* 108.

Nor, if he recovers damages against another in an action upon the case for disturbing him in the exercise of the office. *Semb.* 2 *Lev.* 108.

So, seisin of services, by the hand of a lessee for years, is not sufficient for an assise against him in the reversion, after the years expired. 2 *Rol.* 465. *l.* 2. 1 *Rol.* 314. *l.* 45.

Or, by the hand of a tenant at will. 1 *Rol.* 314. *l.* 42.

So, seisin of rent-service is not sufficient for a rent, which becomes seck by the act of the party himself; as, if the lord grants his feignory, saving the rent, seisin of the rent before is not sufficient to have an assise of the rent, which is now seck. 4 *Co.* 9. *b.*

So, if a donor or lessor for life grants the reversion, saving the rent. *Ibid.*

So, if a man makes a feoffment of land upon condition, and afterwards

wards the condition is broken, he cannot maintain an assise before entry and a new seisin obtained. 4 Co. 9. b.

(E) What is sufficient to make a Distress.

BUT a seisin in law is sufficient to have a distress for rent. 4 Co. 9. a.

So, it is sufficient for an avowry, &c. for rent, or other service, since the *st.* 32 H. 8. 2. tho' that statute speaks of actual possession within forty years; for that shall be restrained to seisin for an action, and not for a distress. R. 4 Co. 10.

And seisin of homage is a sufficient seisin to enable a distress for all other services, superior or inferior. R. 4 Co. 8. b. *Bevil.*

So, seisin of any superior is seisin of every inferior service; as, if a man holds by *escuage* and other services, seisin of *escuage* is seisin of homage, fealty, &c. R. 4 Co. 8. b.

So, seisin of homage is seisin of fealty. 4 Co. 8. b.

And if the tenure be by fealty and rent, seisin of the rent is seisin of the fealty. *Ibid.*

And seisin of the fealty is seisin of the rent. R. 4 Co. 8. b.

So, acceptance by the lord from his tenant of an horse, &c. for rent due, is seisin of the rent. 1 Rol. 314. l. 25.

So, if the tenant pays an amerciament for not doing suit, or makes a composition for it, it is seisin of the suit of court. 1 Rol. 314. l. 20.

So, an attornment, or recovery in avowry for any service, is a sufficient seisin of the service. 1 Rol. 314. l. 17. 27.

So, seisin of any annual service is seisin of all casual services; as, seisin of rent, suit, &c. is seisin of *escuage*, homage, fealty, ward, relief, heriot-service, service to pale in the park, or cover the hall of the lord, &c. 4 Co. 8. b.

But seisin of a superior service is not seisin of any inferior, which is not incident. *Ibid.*

So, seisin of any annual service is not seisin of any other annual service; as, seisin of rent is not seisin of suit, work-days annually, &c. 4 Co. 9. a.

(F) Disseisin.

(F 1.) What shall be.

[THE precise definition of what constituted a disseisin, such as made the disseisor the tenant to the demandant's *precipe*, tho' the right owner's entry was not taken away, is not now known; but it was, some way or other, turning the tenant out of his tenure, and usurping his place and *feudal relation*. It was a complicated fact, and differed from *dispossessing*. The freeholder by disseisin differed from a possessor by wrong, or mere intruder without investiture. *Taylor v. Horde*, H. 30 Geo. 2. 1 B. M. 60.]

[Cases where the true owner thinks fit to admit himself disseised, in order to bring his assise, are very different from actual disseisins in spite of the true owner, *i. e.* from such disseisins as made the disseisor tenant to every demandant and freeholder, *de facto* in spite of the true owner. *Ibid.*] (*Vide Cowp.* 702.)

[Disseisin at *election* is very different from actual disseisin, tho' the same term is applied to both. *Ibid.*]

Disseisin

Disseisin is the tortious ousting of seisin in lands or tenements.
Co. L. 153. b.

As if a man enters into lands or tenements, where his entry is not congeable, and ousts another of his freehold. *Lit. f. 279.*

If he enters upon the possession of a lessee, this ousts the lessor of his freehold.

Tho' the lessee continues payment of his rent afterwards. *Dub. 1 Rol. 658. l. ult.*

So, if a man disturbs the entry of him who has right, into land, it will be a disseisin. *1 Rol. 659. l. 15.*

If he cuts down trees contrary to the command of him who has right.

If he comes to an house that is locked up, and takes the door in his hand, and claims it in fee; tho' he does not enter, it will be a disseisin of the house. *R. 1 Rol. 659. l. 5.*

So, if a copyholder leases by licence for years, and afterwards ousts his lessee, it will be a disseisin to the lord. *1 Rol. 662. l. 47.*

So, it will be a disseisin, tho' made by colour of right; as, if tenant for life or years makes a feoffment, and the feoffee enters, he will be a disseisor.

So, if he makes a gift in tail, or lease for life, other than his own life, and the donee or lessee enters.

So, if lessee at will, or by sufferance, makes a lease for years, and the lessee enters. *R. Cro. El. 830.*

If the lessee continues in possession after a fine, or surrender to the lessor.

Or, after his term expires, after entry, or against the will of the lessor.

So, if the king's patentee enters, where the king has no right to make a grant.

If the escheator, or other officer of the king, seizes the land without cause.

If a man, who has no right, obtains land out of the hands of the king upon false suggestion. *1 Rol. 658. l. 40.*

If a demandant enters *pendente lite*.

Or, sues execution after his release given, after verdict, and before judgment.

Or, enters after a recovery utterly void.

If a sheriff, upon a general writ, makes execution of other land. *1 Rol. 664. l. 5.*

So, if an officer executes an office, to which another has a right, by appointment of the court, he will be a disseisor.

If a woman takes dower to which she has no title, by assignment of a guardian, she will be a disseisorefs,

So, if a man enters by feoffment of a guardian.

If a guardian continues possession after full age of his ward, he will be a disseisor. *Co. L. 57. b. 1 Rol. 659. l. 50.*

So, if a man enters by release of an infant, he will be a disseisor.

If he enters to make livery for him who has no right.

If he enters by colour of a lease from the disseisor after the entry of the disseisee. *1 Rol. 662. l. 30.*

And every one will be a disseisor who is *particeps criminis*; as, if a man commands another expressly to make a disseisin, *1 Rol. 663. l. 20. 25.*

If

If he gives assent precedent or subsequent to the disseisin.

If a lessee, guardian, tenant by *elegit*, &c. makes a feoffment, &c. he will be a disseisor, as well as the feoffee, &c. who enters.

So, if a lessee attorns, or voluntarily pays his rent to a stranger.

So, a *feme-covert*, or infant, may be a disseisor by actual entry, without her husband. 1 *Rol.* 660. l. 30.

Or, if they agree to a disseisin by another after the coverture determined, or at full age. 1 *Rol.* 660. l. 23.

So, if a man enters by a disseisin, he will be a disseisor, tho' he claims only for years; as, tenant by statute, in dower, &c. where they have no right to it; for they cannot qualify their wrong. 1 *Rol.* 662. l. 35. 40.

If one parcener enters, claiming the whole, and takes the profits of the whole, it will be a disseisin of his partner. *Co. L.* 373. b. 243. b. *Vide Parcener*, (A 3.)

What shall be a disseisin of a rent, *vide Rent*, (D 2.)

(F 2.) What not.

But an act, which does not oust him who has the freehold, tho' it be tortious, will not be a disseisin; as, if a commoner commands the owner of the soil not to cut down trees, whereupon he desists, and goes off out of the land, it is no disseisin; for he who has right shall not be ousted of his seisin by *parol*. 1 *Rol.* 659. l. 10.

So, if *A.* enters upon the possession of *B.* but does not expel him, it is no disseisin. 1 *Sal.* 246. *Co. L.* 181. a.

So, if a man makes a lease, off the land, to him who has the possession, and rent be paid to him, it will not be a disseisin without more. 1 *Rol.* 659. l. 40. 45. *Vide infra*.

So, if a man erects a shop in a vacant place of the king's manor, without paying rent, it will not be disseisin; for the king cannot be ousted of his seisin. 1 *Rol.* 659. l. 25.

Tho' he continues in the shop after a grant of the manor by the king to another in fee; for the first being no disseisin, the continuance of the same act will not be so. *R.* 1 *Rol.* 659. l. 25.

So, if a man enters upon the land of *A.* in ward of the king, and takes the profits as owner, and continues the possession after livery sued by *A.* it will not be a disseisin, when the first act was not so. *R.* 1 *Rol.* 654. l. 30.

So, if tenant *in capite* devises all his land, which is void for a third part, and the devisee enters, and makes a lease of the whole, it will not be a disseisin; for he was tenant in common with the heir, and tenant in common cannot be ousted without actual ejectment. *R.* 1 *Rol.* 658. l. 45. *Mo.* 546.

So, tho' the devisee levy a fine of the whole. 1 *Rol.* 658. l. 50.

So, a disseisin of part of a manor, rent, &c. if there can be a severance, will not be a disseisin of the whole. 1 *Rol.* 664. l. 21.

So, it will not be a disseisin, where a man enters by sufferance of the owner. 1 *Rol.* 659. l. 20. *R.* 1 *And.* 134.

So, if a lessee continues in possession after his term, without other act; for he is only tenant by sufferance. 1 *Rol.* 659. l. ult.

So, if a stranger makes a lease by indenture to tenant by sufferance, without ousting the possession, it will not be a disseisin, tho' tenant by sufferance pays him the rent upon the lease. *R.* 1 *Rol.* 659. l. 40.

So,

So, if guardian by nurture makes a lease to any one in possession under the title of the infant, rendring rent to himself, which is paid accordingly, it will not be a disseisin. *1 Rol. 659. l. 45.*

So, if a man enters, claiming only a lawful estate, he will not be a disseisor, tho' he has no right to it; as, if a man makes a lease to *B.* and his heirs for years, and the heir enters, claiming the term which does not belong to him. *1 Rol. 662. l. 45.*

If a devise be void for a third part, and the devisee enters, claiming the whole by the devise. *R. Cro. El. 641.*

So, if a sheriff, &c. does execution pursuant to his authority, he will not be a disseisor, tho' the judgment or process was erroneous. *R. 1 Rol. 664. l. 5.*

As, if the sheriff makes restitution after a reversal in error, without a *scire facias* against the terre-tenants who were not parties to the record, as they ought to be. *R. 1 Rol. 663. l. 50.*

[Where an ejectment is brought, there can be no disseisin. *Taylor v. Horde, H. 30 Geo. 2. 1 B. M. 60.*]

[Taking possession under a judgment in ejectment is not a disseisin of the freehold; nor can the true owner elect to make it so. For the entry is under authority, and lawful, therefore not liable to be punished by fine; nor can the true owner enter upon such recoveror as a disseisor. *Ibid. Corp. 701.*]

(F 3.) What shall be so, or not, at Election.

So, if a lessee at will, or by sufferance, makes a lease, it will not be a disseisin but at the election of the lessor. *R. 1 Rol. 661. l. 25. Cro. Car. 302. J n. 316. Vide Estates, (H 1, 2.)*

So, if a man enters by colour of a lease, which is void, and pays rent to the lessor, he will not be a disseisor, but at the election of the lessor. *R. 1 Rol. 661. l. 45.*

Tho' he claims a lease for life, as well as where he claims by a lease for years or at will. *R. cont. 1 Rol. 662. l. 10. Vide Estates, (H 1, 2.)*

So, if *A.* makes a lease for years, and afterwards makes a jointure, and aliens the fee to *B.* who enters, and takes the rent of the lessee, and then the wife enters, claiming her jointure, and takes the rent, it will be a disseisin, or not, at the election of *B.* *1 Rol. 662. l. 15.*

So, if a lessee attorns, or pays his rent to a stranger without coercion, without more, it will not be a disseisin, but at the election of the lessor. *1 Rol. 659. l. 17.*

So, if a man enters, claiming as guardian, when he has no right to be so, it will not be a disseisin, but at the election of the heir. *1 Rol. 661. l. 20.*

If he enters upon the land of an infant by his assent, for his assent is void. *1 Rol. 661. l. 40.*

(F 4.) Who shall not be a Disseisor.

So, the king or queen cannot be a disseisor.

So, a feme-covert shall not be a disseisorefs by the act of her husband, or a stranger. *1 Rol. 660. l. 5. 10.*

Tho' she agrees to it during the coverture; for her agreement is void. *1 Rol. 660. l. 15. 20.*

So, an infant cannot be a disseisor by the act of a stranger, tho' he agrees to it during his nonage, *1 Rol. 660. l. 25. 35.* Tho'

Tho' the feme-covert or infant be present, when the husband or stranger enters, without more. 1 *Rol.* 660. l. 37. 661. l. 12.

So, a feme-covert by actual entry cannot make a disseisin to the use of her husband, or a stranger. 1 *Rol.* 660. l. 50.

So, a corporation cannot make a disseisin in their corporate capacity; for the person who does the act is the disseisor in his natural capacity. 1 *Rol.* 661. l. 5.

So, if a man commands *A.* to enter into land, when he has no right, and *A.* enters accordingly, *A.* alone will be the disseisor, and not he who gave the command. 1 *Rol.* 663. l. 10. 15.

If a man leases the land of another for years off the land, and the lessee enters, the lessee alone will be the disseisor. 1 *Rol.* 663. l. 27.

But if a lessee at will or by sufferance makes a lease for years, the lessor only will be the disseisor. *R.* 1 *Rol.* 663. l. 30. 40.

[He who enters under a void lease, is not a disseisor but tenant at will. 1 *Wilf.* 176.]

Vide more concerning *Seisin*, in *Pleader*, (C 33.—E 22.)

Primier Seisin.

Vide Prærogative, (D 59.)

SEISURE.

Vide Copyhold, (H 7.—K 20, 21. 25.)—*Prærogative*, (D 68.)

— of Arms.

Vide Justices of the Peace, (B 12.)

— of Felons' Goods.

Vide Forfeiture, (B 4. 7. 8.)—*Justices (Z)*.—*Pleader*, (2 S 18.)

— of Forfeited Goods.

Vide Trade, (C 6.)

— of Temporalities.

Vide Prærogative, (D 23, &c.)

SEMINARY.

Vide Popery, (B 6.)

SEQUESTRATION.

Vide Chancery, (D 7.)

SEREMENT.

(A) When an Oath shall be required.

NO oath can be required, unless it be established by act of parliament, or by common law. 2 *Inst.* 479. The

The oaths of judges, counsellors, sheriffs, under-sheriffs, escheators, attornies, mayors, and bailiffs, are established by act of parliament. 2 *Inst.* 479.

When the oath of allegiance shall be required, *vide Allegiance*, (B 1, &c.)

[(A 2.) How an Oath shall be taken.]

[On the principles of the common law, no particular form of oath is essential to be taken by a witness. *Cowp.* 389.]

[Therefore *Jews*, before their expulsion in the 18th of *Ed.* 1., were permitted at common law, and are still permitted to be sworn on the Old Testament. *Id. ibid.*]

[*Turks* may be sworn on the Alcoran. *Id. ibid.*]

[And *Gentoos*, according to the ceremonies of their own religion. *Vide* 1 *Atk.* 25.]

[The testimony of a sectary, who refused to kiss the book, but whose form of swearing was by opening the book, and lifting up his right hand, has been admitted in a civil action. 2 *Sid.* 6.]

(B) When not.

BUT a new oath, not established by the common law or authority of parliament, cannot be imposed upon a judge, commissioner, or other subject. 2 *Inst.* 479.

Tho' allowed by the king's patent. *Semb. per Cooke*, 1 *Rol.* 5.

But an addition to an oath, which is for the public good and due execution of his office, may be made by order of the king and the state without parliament. *Semb. Cro. Car.* 26.

And therefore, by the common law, *juramentum calumnie in causis ecclesiasticis* could not be required of laymen, except in *causis matrimonial. et testament.* 2 *Inst.* 657.

Tho' allowed by the constitution of *Otho*, 21 *H.* 3. *A.* 1236; for a canon contrary to a statute or the custom of the realm has no force. 2 *Inst.* 658.

Tho' it seems to be warranted by the *st.* 2 *H.* 4. 15. for that was repealed by the *st.* 25 *H.* 8. 14. and 1 *Ed.* 6. 12. and tho' revived by the *st.* 1 & 2 *Ph.* & *M.* 6. was afterwards repealed by the *st.* 1 *El.* 1. and continues repealed. 2 *Inst.* 658.

But it might be demanded of the clergy. 2 *Inst.* 657.

And of a layman in a matrimonial or testamentary cause; for in these cases the transaction is often in private. 2 *Inst.* 657.

So, no person, ecclesiastical or temporal, shall be examined upon oath in an ecclesiastical court of his thoughts. 2 *Inst.* 658. *Vide Prohibition*, (G 13.)

By the *st.* 13 *Car.* 2. 12. no ecclesiastical judge may tender an oath *ex officio*, or any oath whereby any person may be charged to accuse, purge himself of, or confess any criminal matter, that may subject him to censure or punishment.

And therefore no one can be bound by the spiritual court to take an oath to present or accuse himself. *Hard.* 364.

Nor, to make oath, that he will present upon such articles *inter alia.* *Ibid.*

Nor, to take an oath, except in a matter proper for the jurisdiction of

of the spiritual court, as in *causa matrimonial. vel testamentar.* *Hard.* 364. 2 *Inst.* 657. 1 *Rol.* 220. 2 *Bul.* 182. *Vide Prohibition,* (G 4.)

Nor, to answer upon a matter within their jurisdiction upon oath, before it be presented by two at least. *R. Cro. El.* 262.

Nor, to answer upon a matter which subjects him to a penal law, tho' the jurisdiction of the spiritual court be saved; as, if he takes usury, hears mass, &c. 2 *Inst.* 657. 2 *Rol.* 305. l. 15. 25. 2 *Cro.* 388. 1 *Rol.* 220. 2 *Bul.* 183.

Nor, to give an account of his faith. 2 *Rol.* 305. l. 35.

Nor, to answer to an accusation of incontinency, &c. *R. Cro. El.* 201.

Or, of covin or fraud in a lease for years. *R. Hob.* 84.

Nor, to answer to a matter, which, being proved, will be a forfeiture of his freehold. *R. Sal.* 550.

Or, a forfeiture of his bond. *R. 1 Rol.* 110.

The suppletory oath may be tendred to the party by the judge in the ecclesiastical courts, on a *sempierna probatio in causa matrimonial.* *Williams v. Osborne, Delegates,* 1717, *Str.* 85.]

[The exercise of it lies in *arbitrio judicis.* *Ibid.*]

So, an oath established by a canon to make no alteration in the government of the church by archbishops, bishops, deans, archdeacons, &c. is not legal. 3 *Rush.* 1186. 1205.

Nor, an oath established by a bye-law of the dean and chapter, who have power to make bye-laws, before an archdeacon shall be admitted to his office. *R. 2 Mod. Ca.* 27.

So, the secondary of the King's Bench cannot examine upon oath, but the examination shall be in the Crown-office. 2 *Rol.* 499.

[An affidavit cannot be taken by a commissioner who is the party's attorney, or his menial servant, or his agent in that cause; but if only agent in another, he may. *Cocksedge v. Rickwood,* C. B. P. 20 G. 2. *Barnes,* 45.]

[It is ordered, that from and after the last day of next term, upon every affidavit sworn in this court, or before any judge or commissioner thereof, and made by two or more deponents, the names of the several persons making such affidavit shall be written in the jurat; and that no affidavit be read or made use of in any matter depending in this court, in the jurat of which there shall be any interlineation or erasure. *Reg. Gen. B. R. M.* 37 *Geo.* 3. 7 *T. R.* 82.]

[The Christian names as well as surnames of the parties must be inserted in the title of an affidavit produced to shew cause against any rule. *Fores v. Diemar,* B. R. E. 38 *Geo.* 3. 7 *T. R.* 661.]

[A rule was discharged because the affidavit on which it was obtained was not intitled in any court; the words "in the" only being prefixed. *Osborn v. Tatum,* C. P. E. 38 *Geo.* 3. 1 *Bos. & Pull.* 271.]

[The court will in no case issue an attachment against a party at the suit of another, where the affidavits on which the motion is founded are sworn before the agents of the prosecutor. *Rex v. Wallace,* T. 29 *Geo.* 3. 3 *T. R.* 403.]

[If an affidavit be put into court without any title, the court cannot take any notice of it, tho' the adverse party is willing to waive the objection. *Owen v. Hurd,* B. R. M. 29 *Geo.* 3. 2 *T. R.* 643.]

[When a defendant, who has been convicted on an indictment, comes

comes up to receive judgment, the prosecutor may read affidavits in aggravation, tho' made by witnesses who were examined at the trial, which affidavits the defendant is at liberty to answer. *Rex v. Sharpness*, E. 26 Geo. 3. 1 T. R. 228.]

[The court of B. R. will take cognizance of affidavits sworn before foreign magistrates if properly authenticated to them. *Dalmer v. Barnard*, B. R. E. 37 Geo. 3. 7 T. R. 251.]

(C) When required of a Peer.

SO, all lords of parliament in the trial of causes before them shall not take any oath. *Seld. vol. 3. p. 2. 1533.*

So, by the antient law, when they answer as defendants in any court, the answer shall be, upon protestation of their honour, without oath. *Cont. per Just.*; but it was R. acc. in Parliament, 2 Car. Jon. 154. *Per Harcourt*, Sal. 513. *Seld. vol. 3. p. 2. 1335.*

Tho' the answer be to a charge against him; as, in the Star-chamber, &c. *R. cont. Hut. 87.*

But a peer made chancellor, treasurer, justice of the peace, or other officer, shall take the usual oath of office. *R. Jon. 152.*

So, he shall take the oath of homage. *Jon. 152.*

So, if he wage his law, it shall be upon oath. *Jon. 153.*

So, if he be a witness. *Jon. 153. Sal. 513. Semb. cont. Seld. vol. 3. p. 2. 1535. R. acc. 2 Mod. 99. Acc. Dy. 314. b. in marg.*

Or, make an affidavit. *Sal. 513.*

Or, be examined upon interrogatories. *R. per Harcourt, Sal. 513.*

And when sworn, a peer puts his hand upon the gospels, as others do. *Dy. 314. b. in marg.*

Perjury, how punished, *vide in Justices of Peace*, (B 104, &c.)

SERJEANT AT ARMS.

Vide Chancery, (D 6.)

SERJEANT AT LAW.

Vide Ley, (D 2, 3.)

SERJEANTY.

Vide Homage (F).

SERVANTS.

Vide Justices of the Peace, (B 58, &c.)

S E R V I C E S.

AS to the services or tenures whereby lands are held, *vide Homage*, (A—B, &c.)

How a feignory shall be created by reservation of services, *vide Seignior* (A).—*Honour*.

Vide more concerning Services, in *Copyhold*, (K 8.—M 4.)—*Pleader*, (3 K 15.)—*Suspension* (A).

S E R V I C E S.

The King's Service.

Vide War, (B 1, &c.)

Knight's Service.

Vide Homage, (G 1, &c.)

Writ of Services.

Vide Droit (G).

S E S S I O N S.

Vide Assise, (B 23.)—Justices of the Peace, (D 1, &c.)

Sessions of Parliament.

Vide Parliament (Q).

S E T T L E M E N T.

Marriage-Settlement.

Vide Chancery, (3 M 3. 5.)—(3 Z 1, &c.)

Voluntary Settlement.

Vide Chancery, (3 M 5.—4 H 9.—4 O 7.)

Settlement of the Poor.

Vide Justices of the Peace, (B 71, &c.)

S E T T L E D U S E.

Vide Uses, (K 5.)

S E V E R A N C E.

Vide Assise, (B 10.)—Copyhold, (Q 4.)—Estates, (K 5.)

Severance of Tythes.

Vide Dismes, (I 1, 2.)

S E W E R S.

(A) Commission of Sewers.

By the common law the king might make a commission for the survey and repair of the banks, walls, and other fences against the sea, before any statute of sewers. 10 Co. 141. F. N. B. 113. But

But by the *st.* 6 *H.* 6. 5. it was first enacted, that commissions of sewers be granted; and it prescribes their form.

And now by the *st.* 23 *H.* 8. 5. commissions of sewers shall be directed in all parts in the realm, when and where need shall require, according to the tenor there ensuing.

(B) To whom granted.

BY the *st.* 23 *H.* 8. 5. the commission of sewers shall be directed to such substantial and indifferent persons as shall be named by the lord chancellor, lord treasurer, and two chief justices, or any three of them, whereof the chancellor to be one.

And by the same statute, every person named a commissioner shall attend the execution of the said commission.

And before he acts shall take an oath before the lord chancellor, or such to whom a *dedimus potestatem* is by him directed to take the same, or before the justices of peace at the quarter sessions for the same county, truly to execute the authority, &c.

And if any one sits as a commissioner before he is sworn, he forfeits 40 *l.* for every time; a moiety to the king, a moiety to him that shall sue, &c.

And by the *st.* 25 *H.* 8. 10. any commissioner refusing to be sworn, the refusal being returned into *Chancery* on the king's writ, shall forfeit five marks for every such contempt, unless he shew reasonable cause to the chancellor for such refusal.

But by the *st.* 23 *H.* 8. 5. none shall sit as a commissioner, not having lands, tenements, or hereditaments in fee, in tail, or for life, of forty marks *per annum*, above all charges, to his own use, except he be resident in and free of some city, borough, and town-corporate, and have moveable substance of 100 *l.* value, or be an utter barrister at law, on pain of 40 *l.*; a moiety to the king, a moiety to the informer.

By the *st.* 25 *H.* 8. 10. none shall be bound to act in the commission, unless he be dwelling in the same county.

By the *st.* 13 *El.* 9. no farmer for years of lands within the limits of the commission shall intermeddle in the execution of the commission, unless he have 40 *l.* *per annum* freehold, and then only as to such lands which he holds not as farmer.

And therefore, if a man be entitled to a reversion, or remainder after an estate for life, of the annual value of forty marks, he cannot be a commissioner, for he has not an estate *in presenti*. *Cal.* 194.

So, if he be seised of franchises or liberties, if they are not demised for the annual rent of forty marks; for tho' they are hereditaments, they are not of an annual value. *Ibid.*

Or, if he be seised of casual services; as, homage, heriot, relief, &c. *Ibid.*

Or, if he be seised of an advowson; for it is of no value. *Ibid.*

So, joint-tenants, or tenants in common, or parceners of lands of forty marks *per annum*, cannot be commissioners; for tho' they are seised *per my* & *per tout*, yet each has only a moiety. *Cal.* 195.

So, a man seised in right of his wife cannot be a commissioner. *Ibid.*

Nor, a man seised in trust for another. *Ibid.*

Nor, a dean and chapter, mayor and commonalty, or other corporation aggregate seized *jure incorporationis*. Cal. 195.

So, an alien cannot be a commissioner. Cal. 196.

Nor, a lessee for years of a farm, unless he has also a freehold of 40*l.* *per annum*. Cal. 197.

So, a disseisee before entry cannot be a commissioner. Cal. 198.

Nor, a bargainee of lands before enrolment, tho' the deed be afterwards inrolled. *Ibid.*

So, a freeman of a corporation cannot be a commissioner, unless he be also resident within the borough, and have 100*l.* personal estate. Cal. 191, 192.

If he be not actually admitted to his freedom. Cal. 190.

And residency in law is not sufficient, unless he be actually resident within the borough. Cal. 191.

* Tho' he inhabit within the walls, if he be not also within the precinct and liberty of the borough. Cal. 192.

So, if a freeman has no personal estate in possession, it is not sufficient, tho' he has debts upon statute, judgment, bond, or contract, to the value of 100*l.* *Ibid.*

So, if he has it not in his own right, tho' he is possessed of it in right of his church, or as a member of a corporation, &c. Cal. 193.

Or, as lessee for years upon a demise. Cal. 196.

Yet an utter barrister may be a commissioner, tho' he has not any lands. Cal. 198.

So, a man may be a commissioner having forty marks *per annum*, tho' he be a villein. Cal. 196.

Or, be an infant. Cal. 202.

So, a woman may. *Ibid.*

So, a man who has lands in respect of his office; as, the warden of the *Fleet*, &c. seized for life of an office, to which forty marks *per annum* belong. Cal. 196.

So, a bishop, parson, &c. seized in right of his church. Cal. 196.

So, it is sufficient if he have lands of forty marks, when he acts as a commissioner, tho' he had not when the commission was granted. Cal. 198.

Or, tho' he afterwards sell them. *Ibid.*

So, if a freeman has 100*l.* personal estate, it is sufficient in whatever place it lies. Cal. 193.

Or, by whatever means he obtained it. Cal. 193. &c.

But if a person not qualified act as a commissioner, he will be subject to the penalty; but his acts and decrees remain good. Cal. 203.

(C) Authority of the Commissioners.

(C 1.) To what Things it extends.

BY the *st.* 23 *H.* 8. 5. commissions of sewers shall be directed in all parts within this realm, &c.

And therefore all the *English* sea, being *infra regnum Anglia*, may be within the jurisdiction and extent of the commission of sewers. Cal. 18.

So, the *Isle of Man*, the *Isle of Wight*, *Wales*, and other antient or new islands within the kingdom of *England*. Cal. 20.

So, lands deserted by the sea. Cal. 22.

The

The shores and coasts of the sea. *Cal. 30. 32.*

The arms of the sea, creeks, havens, and ports. *Cal. 33.*

But the authority of the commissioners does not extend beyond the limits of their particular commission. *Cal. 36.*

So, land deserted by or gained from the sea after the commission granted cannot be within the jurisdiction of the same commission. *Cal. 38.*

So, the sea, or creeks and bays of the sea, are not within the management of the commission. *Cal. 38.*

So, lands deserted, before they are got to be profitable, are not within the defence of the commission. *Cal. 38.*

And therefore the commissioners may build a wall, bank, &c. for the advantage of the other country, but not for the defence of the lands deserted, till they are profitable. *Cal. 38.*

[The commission of sewers extends only to navigable streams, unless within two miles of London. *Vide st. 3 Jac. 1. c. 14. & 2 Bl. Rep. 717.*]

[Ye if the sewer communicate with a navigable stream, or with the sea above the point where the tide ebbs and flows, if it be useful for navigation, and if the place over which the jurisdiction is exercised be likely to be benefited, or be so in fact, the commissioners have jurisdiction. *2 Term Rep. 358.*]

(C 2.) What Defences they may mend.

By a commission founded upon the *st. 23 H. 8. 5.* it is recited, *that forasmuch as the walls, banks, gutters, sewers, gates, calceys, bridges, streams, and other defences by the sea-coast and marsh ground within the limits of A., &c. or the confines of the same, by the rage of the sea, or by means of trenches of fresh water, having course to the sea, be so lacerate, &c. we therefore have assigned you or six of you (three quorum) to survey the said walls, &c. and the same cause to be made, corrected, repaired, amended, put down, or reformed, as the case shall require, &c.* *10 Co. 143. a.*

And therefore the commissioners have authority for repairing the walls and banks of the sea. *Cal. 37, 38.*

And also the banks and walls of navigable and other rivers which have a course to the sea. *Cal. 52.*

So, they may reform such walls and banks, if necessary. *Cal. 51, &c.*

So, the commissioners have power of rivers, gutters, ditches, ponds, pools, sewers, and streams. *Cal. 57, &c.*

So, if a navigable river becomes dry, they may, for the benefit of the navigation, supply it with water from another river, which has a superfluity. *Cal. 62.*

Tho' the navigation be only for private boats for carriage of the goods of others; for that is a common benefit. *Cal. 62.*

So, the commissioners have power of all bridges which stand upon lands surrounded. *Cal. 63.*

So, the commissioners may make *de novo* the antient walls, rivers, &c. where they are decayed or totally perished. *10 Co. 141, 2.*

So, when they make a new wall, &c. they may make any little alteration for the good of the public; as, if a wall, &c. must of necessity be rebuilt, they may make it in a place more commodious for the level; for it is not a new invention, but an improvement of the antient means for preservation of the level. *10 Co. 142. b.*

But banks, walls, &c. for fences of private grounds, are not within the power of the commissioners. *Cal.* 54.

Tho' they are made to ditches, gutters, or streams for watering or draining their private soil. *Cal.* 54.

Or, for inning and securing of private marshes. *Ibid.*

So, conduits, &c. for private use or convenience, are not within their power. *Cal.* 60.

So, if the town of *B.* be destitute of water for cattle, &c. and the town of *C.* abounds, the commissioners cannot make an order for the relief of *B.* *Cal.* 61.

So, they cannot make an order for conveying a river or other stream (as the cut from *Ware* to *London*, &c.) to any town or city for household affairs; for they have no power but for draining and navigation. *Cal.* 62.

Nor, for navigation of private boats for a man's private use. *Ibid.*

So, it is not within the power of the commissioners to make new works, where there was nothing of that nature before; as, to make a new cut from one part of an old river for seven miles to another. *R.* 10 *Co.* 141, 2.

Nor, new drains, banks, or sluices. *R.* *Mo.* 825.

So, they ought not to make an antient wall, &c. *de novo*; if by a reparation the peril can be avoided. 10 *Co.* 142. *b.*

(C 3.) What Annoyances they may reform.

So, by commission founded upon the 23 *H.* 8. 5. the commissioners have authority not only to survey walls, &c. but because the common passages of ships, boats, &c. in rivers, &c. by means of setting up and making streams, mills, mill-dams, bridges, ponds, fish-garths, locks, weirs, flood-gates, and other like annoyances, be interrupted, &c. the commissioners may cause the same to be made, corrected, amended, put down, or reformed, as the case shall require, after their discretions. 10 *Co.* 143. *a.*

And therefore commissioners of sewers may throw down or reform all annoyances of late times erected to the prejudice of the public good. *Cal.* 54.

But the commissioners cannot pull down or reform any impediments, &c. but according to power to them given by some statute. *R.* 10 *Co.* 138.

And therefore they cannot remove, &c. any mill, cawsey, &c. erected before the time of *Ed.* 1. if it be not afterwards enlarged. *Ibid.*

Or, if it be afterwards enlarged, they cannot throw it down; but only reform the enlargement. *R.* 10 *Co.* 138. *b.*

(C 4.) What they may do by a Survey.

By commission upon the 23 *H.* 8. 5. the commissioners may survey walls, streams, ditches, banks, gutters, calcyes, sewers, bridges, mills, &c. and other impediments and annoyances aforesaid.

And by such survey they may inform themselves what defences want repair, or not. *Cal.* 81.

What annoyances there are. *Cal.* 82.

In what particular the defect consists. *Cal.* 81.

What materials or money ought to be provided for such defects. *Cal.* 81.

So,

So, by a survey they may determine, whether a new sluice, sewer, or other defence is necessary, and in what place. *Cal.* 83.

So, they may direct the repair of a defence, which by survey appears necessary. *Cal.* 82.

Or, the removal of a thing which upon a survey appears to be an annoyance. *Ibid.*

(C 5.) What by Jury.

So, by commission upon the *st.* 23 *H.* 8. 5. commissioners are assigned to survey, &c. and also to inquire by the oaths of lawful men of the shire or place, where such defaults or annoyances be, thro' whose default the same have happened, who holds any lands, tenements, common, &c. or may have hurt, &c. by the said walls, ditches, sewers, &c.

And therefore the commissioners ought to inquire by a jury, by whom any annoyances are erected; and they cannot determine by survey or otherwise, without inquest. *Cal.* 82.

By whose default a wall, bank, &c. or other defence, is defective. *Cal.* 83.

Who are liable to repair by prescription, tenure, &c. *Cal.* 83.

What lands lie within danger, &c. and who is the owner. *Ibid.*

(C 6.) *Jury how summoned, &c.*] By commission the commissioners are authorised to make and direct all writs, precepts, warrants, &c. to all sheriffs, bailiffs, officers, and other persons within liberties, or without, &c.

And the sheriff is commanded to cause to come before them, &c. at the days and places they appoint, as many honest men of the bailiwick, &c. to inquire of the premises.

(D) Commissioners have a Court of Record.

In what Cases they have Jurisdiction.

COMMISSIONERS of sewers are justices, and have a court of record. *Cal.* 128.

By the *st.* 23 *H.* 8. 5. the commissioners may hear and determine all matters within their commission, at the suit of the king, or of any other complaining before them, after the laws and customs of *Romney Marsh*, and after their discretions. *Vide post.* (H 1.)

And therefore any person may prefer his bill of complaint before commissioners of sewers for a matter within the authority of the commission. *Cal.* 129. 173.

So, if the goods of *B.* are taken upon a distress against *A.*, tho' it be tortious, and without authority of the commission, yet *B.* may have redress and his damages upon complaint before the commissioners. *Cal.* 773.

So, if an officer for a distress takes more than he ought, the commissioners will oblige him to return the overplus. *Cal.* 174.

Or, if the distress upon a town be levied upon one person, they shall make the others contributory. *Ibid.*

If an officer buys timber, &c. for the repair of a wall, &c. the vendor shall have a remedy before the commissioners. *Cal.* 175.

Or, if he makes a trench, &c. by order of the commissioners upon the land of another. *Ibid.*

So, labourers, &c. may here recover their wages, &c. *Cal.* 175.

But for a collateral matter they have not authority; as, if *A.* be disseised of lands within the level, chargeable to the repair, &c. the commissioners cannot give relief. *Cal.* 174.

Or, if a wall, which *A.* ought to repair, be thrown down, whereby the lands of *B.* are surrounded, the commissioners cannot give *B.* damages for it. *Ibid.*

(E) When Commissioners may make a Tax.

(E 1.) For what Causes.

BY commission, the commissioners may reform, repair, &c. walls, ditches, gutters, sewers, &c. in all places needful; and if need be, make new, and cleanse, &c. the trenches, sewers, &c.; and amend, prostrate, &c. all mills, streams, &c. and other annoyances, &c.; and hear the accounts of collectors, &c. for receipt and laying out money levied and paid in or about making, repairing, reforming, &c. walls, ditches, &c. and other annoyances.

And also may take as many carts, horses, &c. and as many workmen, &c. as for such reparations, &c. shall suffice, paying for the same competent wages, salary, &c.

And also take as many trees, woods, timber, &c. as for the said works, &c. shall be sufficient, at a reasonable price, &c.

So, by the *st.* 23 *H.* 8. 5. the commissioners may every one have 4*s.* *per diem* for every day they take pains in the execution of the commission, and one clerk 2*s.* *per diem* out of the rates, taxes, &c. assessed by authority of the said commission.

And they may assign of the same rates, taxes, &c. to the clerk for writing-books and process in the premises, and to collectors, expeditors, and others, who shall take pains in execution of the commission, as they shall think reasonable.

(E 2.) How assessed.

By commission upon the *st.* 23 *H.* 8. 5. the commissioners are authorised to inquire, &c. and all those (*viz.* who have or may have hurt or loss, &c.) to tax, assess, charge, &c. after the quantity of their lands, tenements, rents by the number of acres, &c. after the rate of every man's portion, profit, &c. by such ways and means, &c. as shall seem most convenient for redress of the premises.

And upon this the regular course is, that the jury present the particular quantity of land, or other profit, that every one who may have benefit by the repair, or prejudice by the non-repair, has within the level, and thereupon the commissioners make a decree for the assessment of every person in proportion. *Cal.* 82. 10 *Co.* 143. *a.*

And it is sufficient to charge the visible owner or occupier; for if he is not liable for the whole, he may be remedied by application to the commissioners. *Cal.* 111.

So, also the assessment may be charged in general upon such a town, who may afterwards apportion it among themselves. *Cal.* 96, 97.

Or, the commissioners may afterwards make a decree for apportioning it. *Cal.* 96, 97.

[An

[An order to levy nine-pence *per* acre to be paid to the clerk, to be applied towards defraying charges in and about the execution of the commission, is good. *Level of Hull's Case*, H. 13 G. 2. Str. 1127.]

But an assessment upon a town in general, if it be not afterwards apportioned, is not good. R. 10 Co. 143. a. R. 2 Cro. 336. 2 Bul. 197. R. Mo. 825.

Nor, an assessment upon all the lands between such a place and such a place; for it must be upon each part in several. R. Eq. Ca. 94.

So, an assessment upon one only within the level, where others are in equal danger, or have equal benefit, is bad. R. 5 Co. 100. Adm. 10 Co. 143.

Or, an assessment upon a level, with direction to levy it upon one person. R. 2 Cro. 336.

If an assessment be irregular, equity does not aid it. R. Eq. Ca. 94, 5.

(E 3.) When the Charge shall be upon the Owner.

If a man be bound by tenure to the repair of a wall, sewer, &c. he shall be charged alone. Cal. 112. 10 Co. 139. b. 140.

And every one will be bound to whom such land comes. Cal. 90.

If A. and all his ancestors have time out of mind repaired, it is evidence of a tenure to repair. Cal. 89.

So, a corporation may be bound by custom to repair, without shewing any lands by reason of which, &c. Cal. 88.

So, if A. and others drain a level, and are allowed a third part of the level, and thereupon agree to repair the banks of the whole, they will be charged to do it; tho' those who demand it are not parties or privies to the agreement. R. Hard. 169.

So, a man may be bound by his covenant to repair. Cal. 90.

And if the covenant be for him and his heirs, and assigns descend, the heir will be bound. Cal. 90.

So, if no one be chargeable by tenure, prescription, or custom, to repair, the owner of the wall, bank, or other defence, may be charged for it. Cal. 88. 91.

Or, he who has lands adjoining; for a bank, wall, &c. against the sea belongs to him who has land adjoining. Cal. 8.

So, a man who has the use or profit of the wall, &c. or other defence, may be charged to it; as, if a man has security by such defence, in his ferry, crane, pilcary, &c. Cal. 91, 92.

But a man cannot be bound by prescription to the repair, &c. unless it be shewn that he has land *ratione cuius*, &c. Cal. 88.

Tho' he has always repaired, and also his ancestors; for it is only evidence that their land is liable. Cal. 88.

So, a man cannot be charged as owner, or having the use, &c. except where all others who have the use or profit, &c. are also charged in proportion. Cal. 92. *Vide ante*, (E 2.)—*Post*. (E 5.)

(E 4.) When upon the Level.

But where no one appears to be chargeable by tenure, prescription, custom, or covenant, the charge shall be imposed upon the level. Cal. 113.

Or, if land liable by tenure, prescription, custom, &c. be surrounded, or lost. Cal. 113.

Or, if land liable by tenure, &c. escheat. *Cal. 113.*

So, if land liable by tenure, custom, &c. is not sufficient, the residue shall be charged upon the level. *Cal. 114, 115. 10 Co. 139. b.*

Or, the hazard is manifest, whereby if a remedy be not immediately applied beyond what the land liable can supply, the whole country, &c. will be surrounded. *Cal. 114. 10 Co. 139. b.*

So, if damage happens by inevitable accident without the fault of the owner of the land liable, &c. the charge shall be upon the level; as, if it be by an extraordinary tide or flood. *Cal. 114. R. 10 Co. 139. [Rex v. Somerset, T. 39 Geo. 3. 8 T. R. 312.]*

So, the charge of a new wall, sewer, or other work, shall be upon the level, &c. *Cal. 115.*

And also the maintenance of it afterwards. *Cal. 115.*

(E 5.) Who liable within the Level.

All persons who have lands and tenements within the level, or profit *apprendre*, are liable to the tax assessed upon the level, if they may have benefit by the repair, or prejudice by the non-repair.

As, if they have land, meadow, marsh, mill, wood, &c.

Tho' it be his glebe. *Cal. 100.*

Tho' it be copyhold. *Cal. 101.*

So, land of the king, in ecclesiastical person, &c. *Cal. 100.*

So, none can be exempt by custom or prescription. *Cal. 177.*

So, a man who has a common, rent, &c. or other profit *apprendre* out of land, may be charged to the tax upon the level. *Cal. 105. 107.*

The lord of a manor for his quit-rents, rents of assize, &c. *Cal. 108.*

So, a man who has common of turbary, piscary, &c. *Cal. 105.*

So, any who has a ferry. *Cal. 105.*

Or, a liberty of free passage by custom, or prescription. *Cal. 106.*

A park or warren within the level. *Cal. 106.*

So, to extraordinary repairs, which tend to the benefit of the inheritance, a lessor, or reversioner, or remainder-man, after an estate for life or years, may be assessed. *Cal. 109, 110.*

Or, for a new wall, sluice, sewer, &c. *Cal. 110.*

So, to repairs for the benefit of the country in general, a charge may be assessed upon land not liable to be surrounded; as, for repair of a public port, &c. *Cal. 115.*

So, by special custom which warrants a perpetual charge, a decree may be made for imposing a perpetual charge upon land for repair, &c. *Cal. 158.*

But tythes not in the hands of a layman, which arise upon land within the commission, cannot be charged. *Cal. 100.*

So, the lord of a manor cannot be charged for the freehold of his copyholds. *Cal. 103.*

Nor, a commoner after the corn severed; for it is but of small value. *Cal. 105.*

A reversion or remainder expectant after an estate-tail. *Cal. 108.*

Nor, an annuity; for it does not issue out of land, but charges the person only. *Cal. 105.*

Tho' the annuity be paid by a corporation, which cannot be bound, but in respect of their possessions. *Cal. 105.*

Nor, proxies, synodals, &c. *Cal. 107.*

Nor, a man who has only a casual profit; as, a fair, market, &c. *Cal. 106.*

Or,

Or, an office, as town clerk, clerk of a market, &c. tho' they are confined to a place within the level. *Cal.* 107.

Nor, a man who has only title of entry, or action. *Cal.* 107.

Nor, a mortgagor for his title to redemption. *Cal.* 107.

Or, a bargainee, before inrolment. *Cal.* 107.

Nor, a patron, founder, &c. in respect of his advowson, &c. *Cal.* 107.

So, no one can be charged for reparation, &c. but where he has a prejudice by the nuisance, &c. or a benefit by the reformation. *R.* 10 *Co.* 143.

So, to annual or ordinary charges assessed upon a level, a reversion or remainder after an estate for life or years shall not be charged. *Cal.* 110.

So, mountainous or high lands which cannot be surrounded shall not be charged. *Cal.* 104, 176.

So, the commissioners cannot impose a perpetual charge upon land for repair, unless it be warranted by a special custom. *Cal.* 158.

So every person ought to be charged, according to the quantity of his land, and in proportion to his profit, &c. 10 *Co.* 143. *Vide ante*, (E 2.)

(E 6.) Remedy for Assessment.

(E 6.) *By distress.*] By commission founded on the *st.* 23 *H.* 8. 5. the commissioners may assess, distrain, punish, &c. as well within the limits accustomed, or otherwise, or elsewhere within the realm of England.

And may distrain for arrearages of every such collection, tax, and assess, as oft as shall be expedient.

And therefore, where an assessment is made upon lands by authority of the sewers, the officer, by warrant from the commissioners to him, may make distress upon the goods of the party for the assessment. *Cal.* 141.

So, the collector or officer may distrain without an express warrant. *Cal.* 141.

So, if an assessment be made upon land, liable to the repair, &c.; for the repair of any wall, sewer, or other defence, the cattle of a stranger, *levant and couchant* upon the same land, may be distrained for such assessment. *Cal.* 145.

So, a distress may be taken upon the goods of any one charged to the assessment at any place within the limits of the commission, tho' it be not upon the land assessed. *Cal.* 143.

So, at any place within the kingdom. *Cal.* 144.

So, by the *st.* 7 *Ann.* 10. the commissioners, or any six of them, by warrant under hand and seal, may give authority to any person to levy money by them assessed on lands chargeable with such sels, by distress and sale of the goods of the person not paying; and the overplus, after the charges of distress and sale, shall be returned to the owner.

So, before that statute, by express warrant upon an ordinance made by the commissioners for the sale of them. *Cal.* 149. *R.* *Al.* 92.

But the goods of a stranger cannot be sold for an assessment upon A., tho' *levant and couchant* upon his land. *Cal.* 145. 151.

So, the goods of a stranger cannot be distrained for an amercement upon

upon *A.* for non-payment of a tax charged upon his land, liable to the repair of a wall, &c. for default of repair, tho' *levant and couchant*, upon the same land. *Cal.* 145.

(E 7.) *By fines, amerciements, &c.*] If a man, assessed by the authority of a commission, neglects to pay at the time limited, he may be amerced for it. *Cal.* 134, 135.

So, if a collector, expeditor, or other officer, neglect his duty, he may be fined for it. *Cal.* 134.

(E 8.) *By sale of lands. When land may be sold.*] So, by the *st.* 23 *H.* 8. 5. if any assessed, &c. for any lands within the commission, do not pay, &c. according to the ordinance of the commissioners, the said commissioners may decree the lands from the owner and his heirs to any person in fee, in tail, for life or years, for payment of such lot.

And therefore, for non-payment of a sels charged upon the land within the commission, the commissioners may sell the land. *Cal.* 161.

So, if a man be bound by tenure to pay so much *per annum* for repair of the sewers, and the commissioners make a decree that he pay it at such a day, for non-payment they may sell the land. *Cal.* 162.

So, if an assessment be assessed upon a *will*, &c. in general, and afterwards by decree distributed among the owners of the lands within the *will*, for non-payment they may be sold. *Cal.* 162.

So, all lands, tenements, and hereditaments, within the commission, chargeable to the sels, may be sold for non-payment. *Cal.* 162, 163.

And now by the *st.* 7 *Ann.* 10. the commissioners may decree a sale of copyhold lands in the same manner as freehold for non-payment of the lot assessed on them, for such estate as the owner had in them, or any claiming in remainder under him.

Provided he to whom the sale is made, before entry or perception of the profits, agrees with the lord for his fine, who shall thereon admit him tenant.

(E 9.) *When not.*] But the commissioners cannot sell land for other cause, except for non-payment of the assessment; as, for not repairing of a wall, &c. which he ought to repair by tenure, prescription, &c. *Cal.* 161.

So, if *A.* be bound by tenure, &c. to pay 20s. *per annum* for repair, &c. they cannot sell the land for non-payment. *Cal.* 161.

Nor, for non-payment of a fine, or amerciamment, imposed by the commissioners. *Cal.* 162.

So, they cannot sell land which is not specially charged; as, where the assessment is imposed upon a town, &c. no land within the town can be sold. *Cal.* 162.

Nor, when an assessment is imposed upon the land without naming the owner; for some person ought to be assessed for such land. *Cal.* 162.

Nor, when the land does not lie within the commission, tho' it be charged by tenure or prescription, &c. to the repair of a wall, or other work which lies within the commission. *Cal.* 163.

So, they cannot sell in fee for an assessment which may be satisfied by a sale for years, &c. *Cal.* 168.

(E 10.)

(E 10.) *Who bound by a sale.*] By the *st.* 23 *H.* 8. 5. a decree by the commissioners for the sale of land on non-payment of the fees, made and ingrossed in parchment, and certified under their seals into Chancery, with the king's royal assent to the same, shall bind all persons who, at the making of the decree, had interest in such lands in possession, reversion, or remainder, their heirs and feoffees, and not to be reformed but by authority of parliament.

And the same decrees shall bind the lands of the king, as well as of any other person, and their heirs, for such their interest, or any casual profit whatsoever.

And by this *stat.* the issue in tail will be bound by a sale of the land of his ancestor in tail. *Cal.* 166.

So, by such a decree a *feme-covert*, infant, and *non compos*, will be bound. *Cal.* 167.

So, by the *st.* 13 *El.* 9. decrees being written in parchment, indented under seal of the commissioners, tho' not certified into Chancery, or having the royal assent, shall continue in force, tho' the commission be superseded or determined, till altered by subsequent commissioners.

But by a sale of the land of a parson, vicar, dean, bishop, &c. seized in right of his church, his successor is not bound; for by the *st.* 1 & 13 *El.* they are restrained from an alienation that binds the successor. *Cal.* 166.

So, for non-payment of a joint-tenant, or tenant in common, of his part of an assessment, only his moiety of the land shall be sold. *Cal.* 167, 168.

(F) Account of Officers.

BY commission upon the *st.* 23 *H.* 8. 5. the commissioners may assign faithful keepers, bailiffs, surveyors, collectors, expeditors, and other officers, for the conservation, reformation, or making the premises; and may hear the accounts of all collectors and other ministers for laying out money, &c. for repairing, reforming walls, ditches, sewers, &c.

And every commissioner shall have 4s. per day while he labours in execution of the commission; and one clerk to be assigned 2s. per day of the rates, &c. assessed; and the commissioners have power, out of the said rates, &c. to assign to the clerk reasonable sums for writing books, process, &c.; and to collectors, expeditors, &c. as they or any six think reasonable.

(G) Traverse of a Presentment.

IF any be aggrieved by a presentment before commissioners of sewers, he may traverse the presentment. *Cal.* 169. 171.

But a thing done by the commissioners by their survey is not traversable; for they do that as justices, and it is the act of the court. *Cal.* 172.

So, if they fine any for a contempt in court, it cannot be traversed. *Cal.* 172.

So, the traverse ought to be taken before decree of the commissioners. *Cal.* 172.

(H) Decrees of the Commissioners.

(H 1.) What good.

BY commission upon the *st.* 23 H. 8. 5. the commissioners may make statutes, ordinances, and provisions, for the safeguard, redress, &c. of the premises; &c. after the laws and customs of Romney Marsh, &c. after their own wisdoms and discretions.

And by the *st.* 23 H. 8. 5. they may make laws, ordinances, and decrees, and do every thing mentioned in their commission, according to the true meaning of the same; and the same laws, &c. to reform, repeal, and amend, as the case shall require.

And therefore the commissioners may make rules, orders, and decrees, in all cases within their authority and commission.

In what cases they have jurisdiction, *vide ante*, (C 1, &c.—D—E 1, &c.)

And the orders and proceedings of the commissioners, as well as the commission itself, shall be in *English*, and not in *Latin*. 1 Sid. 78.

And does not require so strict a form as an indictment. 1 Sid. 78.

If it charges *A.* to the repair, it need not say what estate he has. *R.* 1 Sid. 145.

(H 2.) What not.

But a decree by commissioners will be void, unless it be according to law and justice; for, according to their discretion, imports that. *R.* 10 Co. 140. a.

So, they cannot pursue laws and customs of Romney Marsh, not warranted by the general laws of sewers, except in such places where such customs by usage have been allowed. *R.* 10 Co. 140. a.

(H 3.) Execution of Orders.

By commission upon the *st.* 23 H. 8. 5. the commissioners are authorised to compel by distresses, fines, amerciaments, and other punishments, ways, or means, &c. all they find negligent or rebelling in the works, reparations, &c. or negligent in the due execution of the commission.

(I) Remedy for Default of the Commissioners.

(I 1.) By Certiorari.

IF the commissioners make an order in a matter out of their jurisdiction, the order may be removed by *certiorari* into *B. R.* and quashed. *R.* 2 Cro. 336. *R.* 1 Vent. 67.

And if the commissioners proceed after a *certiorari* allowed, an attachment shall go against them, and they shall be fined for their contempt. 1 Lev. 288. 1 Vent. 67. 1 Mod. 44. Ray, 186.

Tho' by the *st.* 13 El. 9. the commissioners shall not be compelled to return any of their ordinances, laws, or doings, or suffer in their body, lands, or goods for that cause; for this does not relate to returns to be made upon *certiorari*, but to the return of their decrees in *Chancery*. *R.* 1 Lev. 288. 1 Vent. 67.

So, if the contempt be outrageous, they may be imprisoned. 1 Vent. 66. *R.* 2 Cro. 336.

Or,

Or, indicted for a *præmunire*. *Per Twissd.* 1 *Mod.* 44. *R.* 2 *Cro.* 336.

So, a *certiorari* lies to remove an order for appointing or removing a clerk, &c. 2 *Mod. Ca.* 331.

And if the *certiorari* be quashed, another may be granted. 2 *Mod. Ca.* 331.

But where an order is made for repair upon an inquisition, finding that he ought to repair, the court will not grant a new trial, or quash the order, except where the party consents to the repair in the mean time; and if found that he ought not, he shall be reimbursed. 1 *Sid.* 78.

So, if an order be good in part, it shall be confirmed for so much, tho' it be quashed for the residue. 1 *Sid.* 145.

So, a *certiorari* cannot be demanded of right, but shall be in the discretion of the court upon proper cause. 2 *Mod. Ca.* 331.

[Issues set by a judgment of the commissioners may be discharged on motion, tho' a *certiorari* would not lie originally to remove their order. *Rex v. Bishop, in Sc. P.* 1720, *Bunb.* 61.]

[If orders are removed by *certiorari*, and commissioners offer to try any issue defendant will take, which he refuses, the court will not thereupon grant *procedendo*; but they will not file the orders till the objections are first debated, that they may have it in their power to send them back. *Rex v. Cann, H.* 20 *Geo.* 2. *Str.* 1263.]

(I 2.) By Action.

So, an action lies against the commissioners, or those who act by their precept, if they do any thing out of their authority. *Cont. Mo.* 825.

SHEEP EXPORTED.

Vide Justices, (S 10.)

SHERIFF.

Vide Viscount.

Sheriff's Court.

Vide County, (C 1, &c.)—Courts, (O 4.)

Sheriff's Torn.

Vide Leet (A—B).

SHIP.

Master of —

Vide Merchant, (E 5, 6.)—Navigation, (I 4.)

Navigation of —

Vide Navigation, (I 1, &c.)

SHIRE.

Vide County.

SHOOTING.

Vide Justices of the Peace, (B 43.)—Leet, (L 14.)

SIGNET.

Vide Patent, (C 6.)

SIGNIFICAVIT.

Vide Excommungement, (B 3, &c.)

SIGN MANUAL.

Vide Patent, (C 7.)

SILVER MINES.

Vide Waife, (H 1.)

SIMONY.

Vide Esglise, (N 3.)

SINGLE BILL.

Vide Obligation (C).

SLANDER.

—— of a common Person.

Vide Action upon the Case for Defamation, (D 1, &c.)

—— of a Peer.

Vide Action upon the Case for Defamation, (B 1, &c.)—Libel, (C 4.)

—— of a Title.

Vide Action upon the Case for Defamation, (C 1, &c.)

SOCAGE.

Vide Guardian, (B 1, &c.)—Homage (H).

SOLDIERS.

Vide Prærogative, (C 2.)—Uses, (N 2.)

Soldiers departing without Licence.

Vide Justices, (S 8.)

SOLICITOR.

Vide Attorney, (B 1, &c.)

SOLVIT AD DIEM.

Vide Pleader, (2 W 29.)

SORCERY.

Vide Justices, (S 13.)

S O U L S.

Cure of Souls.

Vide Ecclesiastical Persons, (C 15.)

S P E A K E R.

Vide Parliament, (E 5.—G 14.)

SPECIAL CASES.

[IT is ordered, that from the last day of *Michaelmas* term, 38 *Geo.* 3. all special cases to be set down by the clerk of the papers to be argued, shall be entred within the first four days of the term next after the trial at which such special cases shall have been reserved; and further, that such special cases shall never be set down for argument on any of the last four days of term. *Reg. Gen. M.* 38 *Geo.* 3. 7 *T. R.* 454.]

SPECIAL DAMAGE.

Vide Action on the Case for Defamation, (D 30.—G 11.)

SPECIAL PLEA.

Vide Pleader, (E 15, &c.)

SPECIALTY.

Vide Dett, (A 4.)—Temps, (G 15.)

S P E E C H.

Vide Parliament, (G 7, 8, 9.)

SPIRITUAL LORDS.

Vide Parliament, (D 2.—G 10.)

SPIRITUAL OFFICES.

Admission to —

Vide Prohibition, (G 4.)

SPIRITUAL PERSONS.

Vide Dismes, (C 2.—E 2. 8.)—Pleader, (2 S 22.)

SPIRITUALTIES.

Guardian of —

Vide Prærogative, (D 26, 27.)

SPOLIATION.

Vide Dismes, (M 1.)

SPORTS UNLAWFUL.

Vide Justices of the Peace, (B 42.)

SPRINGING USE.

Vide Uses, (K 7.)

STABBING.

Vide Justices, (M 14.)

STALLAGE.

Vide Market, (F 2.)

STAMPS.

[T]HE numerous acts which have been passed on this part of the revenue, render it necessary to refer the reader to them, without attempting an abstract.]

[A bill is drawn on a proper stamp, dated 2d September, payable twenty-one days after date; it is afterwards altered, and made payable fifty-one days after date; and on 30th September is again altered to twenty-one days after date, and the date is brought forward to the 14th September. This is a distinct transaction from the first, and requires a new stamp, altho' the alterations are made with the consent of the acceptor before the bill is negotiated. *Bowman v. Nichol, B. R. H. 34 Geo. 3. 5 T. R. 537. 1 Esp. Caf. 81. S. C.*]

[Articles of agreement under seal cannot be given in evidence unless stamped with a deed stamp, altho' the agreement stamp is of the same value, but differently formed. *Robinson v. Drybrough, B. R. T. 35 Geo. 3. 6 T. R. 317.*]

[An agreement for the assignment of an apprentice from one master to another must be stamped by *stat. 23 Geo. 3. c. 58. Rex v. Saint Paul's, Bedford, M. 36 Geo. 3. 6 T. R. 452.*]

[No action can be maintained by the plaintiff on a note given to him by the defendant as an apprentice-fee with his son who was to be bound to the plaintiff, if it appear that the indenture executed was void by the *stat. 8 Ann. c. 9.* for want of the insertion of such premium]

mium therein, and a proper stamp respecting the same; altho' the plaintiff did in fact maintain the apprentice for some time, and until he absconded. *Jackson v. Warwick*, B. R. H. 37 Geo. 3. 7 T. R. 121.]

[The plaintiff cannot recover on a written contract made in Jamaica, which by the laws of that island was void for want of a stamp. *Alves v. Hodgson*, B. R. E. 37 Geo. 3. 7 T. R. 241.]

[A note for the weekly payment of the 3 s. 6 d. under the lords' act must be stamped. *Pitman v. Haynes*, B. R. H. 38 Geo. 3. 7 T. R. 530.—*Bowring v. Edgar*, C. P. E. 38 Geo. 3. 1 Bos. & Pull. Rep. 270. contra. *Tekell v. Cassey*, B. R. T. 38 Geo. 3. 7 T. R. 670.]

STANDING MUTE.

Vide Juslices, (X 2.)

STANDING SEISED.

Vide Covenant, (G 1, &c.)

STANNARIES.

Vide Courts, (L 1, &c.)—*Waife*, (H 2.)

STAR-CHAMBER.

Vide Courts (K).

STATE OFFICERS.

Vide Officer (E).*

S T A T U T E.

Vide Action upon the Statute.—*Copyhold* (N—O).—*Forfeiture* (C).—*Jusfices*, (S 1, &c.)—*Parliament*, (G 10, &c.—R 1, &c.)—*Pleader*, (C 76.—2 S 1, &c.)—*Prescription*, (F 3.)—*Prohibition*, (F 8.)

Exposition of Statutes.

Vide Parliament, (R 10, &c.)

Recital of a Statute.

Vide Action upon Statute (G—H—I).—*Pleader*, (2 S 3.)

Repeal of a Statute.

Vide Parliament, (R 9.)

Statute of Distributions.

Vide Chancery, (3 D 1.)

Statute against Gaming.

Vide Pleader, (2 W 26.)

Statute of Limitations.

Vide Chancery, (11.—4 W 17.)—*Temps*, (G 1, &c.).

Statute of Uses.

Vide Uses, (B 1, 2.)

STATUTE-MERCHANT.

Vide Statute-Staple.

STATUTE-STAPLE.

(A) Statute-Merchant and Staple; how bound by it.

BY the *st.* 11 *Ed.* 1. *de Aston Burnell*, a merchant may cause his debtor to come before the mayor of the *staple*, &c. and make recognizance of his debt, which shall be entred on the roll, with the seal of the debtor and the king, in custody of the mayor, &c.

By the *st. de Merc.* 13 *Ed.* 1. he shall come before the mayor, &c. or other sufficient men sworn thereto, if the mayor, &c. cannot attend, and acknowledge his debt and day of payment; and the recognizance shall be inrolled, and the roll double; one part to remain with the mayor, &c. the other with the clerk thereto named; and the clerk shall make an obligation, to which the seal of the debtor shall be put with the king's seal, &c.; of which the one part shall remain with the mayor, &c. the other with the clerk.

By *which statutes* the mayor, with the constables of the *staple*, may take recognizances of merchants of the *staple* for merchandize only of the same *staple*, and not of others. *Vide the st.* 23 *H.* 8. 6.

The clerk of the *staple* shall be named by the king, who may discharge him, and name another at his pleasure. *F. N. B.* 165.

Or, the king, *ex gratia*, may issue a writ out of *Chancery* to the mayor, bailiffs, &c. to discharge him, and choose another, where he does not dwell in the town, or cannot attend his office. *F. N. B.* 164. *E.*

Or, if he has not lands sufficient to answer for misconduct. *Ibid.*

If the statute be not made pursuant to the statutes in any material part, it will be void: as, if there be not two parts sealed. *Jon.* 52. *R. Cro. El.* 233. 355. *Bridg.* 19.

Or, with the seal of the king and the party. *Win.* 84. *R. Mo.* 405.

If it be not before the mayor of the town appointed to be the *staple*. *Dal.* 73. *Bridg.* 19.

Tho' he alleges a prescription to take it, tho' this be evidence that it was appointed by the king to be of the *staple*. *R. Dal.* 73.

If

If it be before the attorney or deputy of the mayor. *Per Jon. Win. 83.*

Or, before one bailiff, where there are two; for both make but one officer. *Win. 83, 84.*

If it be not inrolled. *Win. 84.*

So, by the *st. 23 H. 8. 6.* no mayor, &c. of staple shall take any recognizance, unless between merchants of the same staple for merchandize of the same staple, lawfully bought and sold between them, on pain of 40 l.

But the omission of a circumstance not material does not vitiate: as, if it does not particularize any day of payment; for then it shall be paid presently. *R. Cont. Jon. 1. R. acc. per three J. Jon. 52. Win. 83. 1 Ch. R. 28. Bridg. 19.*

If it be inrolled, tho' not by the hand of the clerk. *Win. 83.*

If the party be not a merchant. *Ibid.*

So, the conusee may say, that the conusor came before the mayor of L. without saying any thing of the statute of *Acton Burneli.* *R. Dal. 73.*

So, a statute does not need a delivery; for it is matter of record. *Cro. El. 494.*

If a statute be void, a *superfedeas* of the extent may issue. *Jon. 1.*

Or, the party may be relieved by *audita querela.* *Jon. 52. R. Cro. El. 233. 355. Vide Audita Querela (A).*

So, if a statute, for want of a seal, &c. be void as a statute, it may be sued as an obligation. *R. Cro. El. 355. 494. 544. Mo. 405. Gould. pl. 137.*

(B) Recognizance.

BY the *st. 23 H. 8. 6.* the chief justice of *B. R.* or *C. B.* and out of term the mayor of the staple at *Westminster*, and the recorder of *London*, may take recognizances under the seal of the party acknowledging, and the seal which the king shall appoint, and the seal and name of the chief justice, &c. before whom acknowledged.

The king shall assign one in the city of *London*, who, by himself or deputy, shall write and inrol the recognizance in two rolls indented; one to remain with the justice who took it, the other with the writer.

And at the request of the creditor, his executor or administrator shall certify the recognizance under his seal into *Chancery*; on which the conusee, &c. shall have like process, execution, and advantage, as on a statute-staple. *Vide, for this, Lut. 430.*

But it is sufficient, if it be found by verdict, that *B. recognovit se debere 200 l.*, without saying by obligation, or under seal, or *secundum formam statuti*; for it shall be intended in a verdict of *lay-gens.* *R. 4 Co. 65. b.*

As to other recognizances, *vide in Obligation (K).*

(C) In what Manner a Statute or Recognizance binds.

A Statute or recognizance is a present duty.

If a statute, recognizance, or *elegit*, be extended, a reversion is left in the conusor. *Co. L. 22. b.*

So, if one statute, &c. subsequent to another, be extended, the

conusee has an interest in the nature of a reversion. *Semb. per Ventris, 2 Vent. 326. Vide post. (E—F).*

And if both the statutes are extended and assigned to the same person, the prior interest will be merged. *2 Vent. 327. Vide, Surrender (F).*

(D) Execution upon a Statute or Recognizance ; in what Manner sued.

(D 1.) Before the Mayor, &c.

BY the *st. de Aët. Burn. 11 Ed. 1. & de Merc. 13 Ed. 1.* if the debtor does not pay, &c. the creditor shall bring his obligation to the mayor, &c. who shall incontinent cause the moveables of the debtor, to the amount of the debt, to be sold and delivered to the creditor by the praisement of honest men, and the king's seal shall be put to the sale, &c.

And if the mayor find no buyers, he shall deliver the said moveables to the creditor at a reasonable price, &c.

And the mayor may cause the body of the debtor (if lay) to be committed to the prison of the town till he agree the debt.

And therefore the mayor may make execution, where the conusee lives, and has lands and goods within his jurisdiction. *F. N. B. 131. D.*

(D 2.) Out of Chancery.

(D 2.) *How the recognizance shall be certified.* By the *st. Aët. Burn. 11 Ed. 1. & Merc. 13 Ed. 1.* if the debtor have no moveables, of which the debt may be levied, or cannot be found within the jurisdiction of the mayor, he shall send the recognizance under the king's seal into Chancery, and the Chancellor shall direct a writ to the sheriff to seize the moveables, or the body of the debtor, (if lay,) and make him agree the debt in the same manner as the mayor, if he had been in his power.

So, by the *st. de Merc. 13 E. 1.* if the debtor agree not the debt in a quarter of a year, by sale of his goods and lands, all his lands and goods shall be delivered to the merchant by reasonable extent, to hold till the debt be levied.

By the *st. 27 Ed. 3. 9.* the quarter of a year is ousted ; but execution shall be on a statute-staple : as, on a statute-merchant.

And therefore, upon a statute-staple or merchant, if execution cannot be made within the staple, the recognizance shall be certified by the mayor into Chancery, under his seal. *F. N. B. 130. C.*

And upon a statute-merchant a *capias* shall issue out of Chancery, returnable in *B. R.* or *C. B.* *2 Vent. 326. F. N. B. 130. G. Cro. Car. 451.*

Tho' a *capias* upon a statute-staple shall be returnable in Chancery only. *F. N. B. 131. D. Cro. Car. 451.*

So, a certificate ought to be made under the seal of the deputy for sealing obligations of statutes. *F. N. B. 130. F.*

If the first certificate omits part of the obligation, whereby the conusee cannot have execution, upon affidavit a writ shall go to the mayor to make another certificate. *F. N. B. 132. B.*

So,

So, if the Chancellor die, or be removed before the obligation upon the first certificate be delivered into court; if the name of the Chancellor be mentioned. *F. N. B. 132. B.*

If the mayor, &c. refuse to certify, the conusee may have a writ to him to make the certificate. *F. N. B. 130. C. 131. D.*

And if he still refuse, he shall have an *alias*, *pluries*, and attachment. *F. N. B. 130. D. 244. E.*

So, a recognizance upon the *st. 23 H. 8. 6.* shall be certified in the same manner by the clerk of the inrolment, as a statute-staple by the mayor. *Lut. 430.*

But if a recognizance was certified before, it ought not to be certified again, without a special writ for that purpose, upon an *affidavit* that execution never was sued. *F. N. B. 130. D.*

So, execution in other manner than the statute directs will be void: as, if a *capias* issues out of *C. B.* without a certificate into *Chancery*, &c. *2 Vent. 326.*

So, if the conusee in a statute-merchant dies after a certificate and a *capias*, upon which the conusor is returned *non inventus*, the executor of the conusee shall not have an *extendi facias*, but must have a new certificate and *capias*. *Cro. Car. 451.*

So, after an extent sued upon a statute-staple, if the conusee, &c. die, the executor must begin *de novo*. *Per three J. Cro. cont. Cro. Car. 451.*

(D 3.) Execution out of Chancery.

(D 3.) *By levary.*] After the recognizance certified into *Chancery*, if the recognisor be an ecclesiastical person, a *levary facias* shall be awarded to levy the debt of his moveable goods; for his body shall not be taken. *F. N. B. 131. D. Reg. 298. b. 300. F. N. B. 265. D. 266. A.*

If part of the debt be levied by *levary facias*, an *alias levary facias* may issue for the residue. *Reg. 299. b. F. N. B. 265. H.*

A *levary facias* against a clerk may be directed to the sheriff, if he has a lay-fee; otherwise, it shall be to the bishop of the diocese, where his benefice lies. *F. N. B. 266. A. B.*

Or, if he has benefices in several dioceses, there may be a writ for part to one bishop, and another for the residue to the other bishop. *F. N. B. 266. A.*

And when the bishop's power was taken away, his tythes might be taken by the sheriff upon an *elegit*. *Hard. 65.*

So, by the common law, upon a recognizance in *Chancery*, a *levary facias* lies within a year against the recognisor, tho' lay, for the money mentioned in the recognizance *de terris et catallis levand*. *F. N. B. 265. D. Reg. 298. b.*

But after a year he must have debt upon a recognizance at the common law; and now by the *st. W. 2. 45.* a *scire facias*. *Reg. 298. b.*

And in lieu of a *levary facias*, by the *st. W. 2. 18.* he shall have an *elegit*. *Reg. 299. a.*

If the sheriff does not execute or return the *levary facias*, there shall be an *alias*, *pluries*, and upon that an attachment against the sheriff. *F. N. B. 265. F.*

(D 4.) *By capias si laicus.*] If the recognisor be a layman, a *capias si laicus* shall be awarded against him out of *Chancery*; which, upon a statute-

a statute-staple, shall be returned in *Chancery* only. *F. N. B.* 131. *D.*

The *capias* upon a statute-merchant may be returned in *B. R.* or *C. B.* *F. N. B.* 130. *H.*

So, a *capias* upon a recognizance before a chief justice, &c. by the *st.* 23 *H.* 8. shall be returned in *Chancery.* *Lut.* 430.

If a man be in prison upon a statute-merchant, he shall have sustentance with bread and water out of his goods. *F. N. B.* 133. *C.*

And if the mayor or sheriff refuse it, a writ shall be directed to him for that purpose. *Ibid.*

(*D* 5.) *By extendi facias.*] Upon a statute-staple, the *capias si laicus* also commands the sheriff *quod omnia terras et catalla, &c. per sacramentum, &c. juxta verum valorem extendi et appreciari faciat, et predicta* (the conusee) *liberari, &c.* *F. N. B.* 131. *D.*

Upon a statute-merchant, after the *capias si laicus* returned, an *alias capias* issues, reciting the first writ and return, which also commands *quod corpus, &c. in prisona custodiri faciat, ita quod per unum quarterium anni vivat de suo, et habeat omnia bona et terras deliberat. ut per se et suos de debito satisfaciat, et si non, &c. tunc omnia bona, terras et tenementa* (to the conusee) *liberari per rationabile pretium et extent. tenend., &c.* *Reg. Jud.* 8.

And afterwards a *pluries capias* to the same effect. *Reg. Jud.* 9.

If upon the first *capias si laicus*, the sheriff commands the bailiff of a liberty, who arrests the conusor, an *alias capias* goes, only to take the goods and lands. *Reg. Jud.* 68. *a.*

And if all the goods and lands are not taken upon the first writ, there may be another writ for the other goods and lands, reciting the first, *Reg. Jud.* 68. *b.*

[After an extent on a statute into one county, and a *liberate* returned and filed, the conusee may have an extent into another county, if the prayer for the second extent was entered at the time the first extent was taken out; otherwise, not. *Oates v. Robinson, T. 7 Geo. Str.* 461. *Fort.* 373.]

[And the Chancellor will give leave to enter the prayer *nunc pro tunc.* *Ibid.*]

If he has no lands but in a county *palatine*, the statute shall be transmitted thither out of *Chancery*, to have execution. *F. N. B.* 132. *A.*

If he purchase lands after the acknowledgment of the statute, they also shall be extended. *Win.* 83.

After a writ of *extent*, the sheriff shall take the conusor, shall extend and appraise his lands and goods, and shall make return of the extent and appraisement to the *Chancery.* *F. N. B.* 131. *D.* *Vide Execution, (C 14.)*

So, he shall extend a rent-charge, or other rent, tho' the statute speaks only of goods and lands. *R. Mo.* 32.

So, he may seise to be appraised, before inquisition found. *R. Mo.* 563.

The inquisition ought to find the certainty of the conusor's estate; for if it says, *quod fuit seifitus vel possessionatus*, it will be insufficient. *Dy.* 299. *a. in marg.*

So, if it finds, that the conusor is dead, *et tempore recognitionis fuit seifitus de manerio de B.*, without saying of what estate; for if he was seised

seised for life, or in tail, the land was not extendible after his death.
Dy. 299. a.

If it finds, that he was possessed of a term of such a date, &c. which is mistaken, it will be bad. R. Cro. El. 584.

Or, for a term *diversorum annorum adhuc ventur.*, without shewing the commencement or time of the term. R. 4 Co. 74.

If it finds, that he was seised of a tenement, it is bad, without shewing how many houses, lands, &c. Mo. 8.

But an inquisition need not find a certainty, of which it cannot be informed; and therefore, if it finds the possession of a term *adhuc ventur.*, it is sufficient, tho' it does not say when it commenced, or for how many years. R. Cro. El. 584. Acc. upon a *feri facias*, but cont. in an extent. 4 Co. 74.

(D 6.) *Liberate.*] After an extent returned, a *liberate* shall go to the sheriff, reciting the *extendi facias* and return, and commanding, that he deliver the goods and lands to the conusee, *si per extentum et pretium illa habere voluerit.* F. N. B. 131. D. Lut. 432.

Till a *liberate* the land is not vested in the conusee. Dy. 67. b. Jon. 90.

But after a *liberate* awarded, the conusee may enter without delivery of the possession by the sheriff. Per three J. Gawdy cont. Cro. El. 463.

And the execution will be good, tho' the *liberate* be not returned. Semb. 1 Leo. 280. 2 Leo. 13. Dub. Godb. 82. Acc. 1 Rol. 737. l. 55. R. 4 Co. 67. a.

And if it be returned, the conusee shall be estopped to say, he had not possession. R. Sal. 563.

But a conusee, upon a statute-staple or merchant, may pray that the extendors shall take the land at the value extended. Co. L. 290. a.

So, a conusee upon a recognizance by the st. 23 H. 8. 6. Co. L. 290. a.

But not tenant by *elegit* upon a judgment or recognizance in court. Co. L. 290. a.

Nor, in execution upon a recognizance by bail. 2 Cro. 13.

Nor, in execution by *elegit* upon a recognizance in Chancery. R. cont. 2 Cro. 13.

The conusee may pray, that the extendors shall take the land at the value extended, any time before his acceptance of the land. Yel. 55.

At the day of the return of the writ. R. 2 Cro. 13. Mo. 753.

Tho' the conusor dies before the return, and his heir is in ward to the king. R. Yel. 55.

But after agreeing to the extent, the prayer is too late. 15 H. 7. 15. b.

As to an extent upon an *elegit*, vide in Execution, (C 14.)

As to the suit of the king, vide in Execution, (B 3, &c.)

(D 7.) *Re-extent. When allowed.*] By the st. 32 H. 8. 5. if lands delivered in execution on a judgment, statute, or recognizance, shall be evicted without fraud or default of the tenant, who holds them in execution, before the debt and damages are wholly levied, the recoveror or conusee may have a *scire facias* against the person on whom the execution was first sued, his heirs, executors, or assigns, of lands then liable, returnable in the same court forty days after the *teste*; and

if the defendant makes default, or shews not cause, the chancellor, or justices of the court where the *scire facias* is returned, shall make a new writ of the like nature of the former execution for levying the residue of the debt.

So, if the conusee after a *liberate* enters, as he may ; for that is tantamount to a delivery in execution. *Co. L. 290. a.*

If a disseisor enfeoffs the king, who grants to *A.*, and afterwards grants the feignory to *B.* who acknowledges a statute, upon which the feignory is extended, and the land escheats, and then the disseisee recovers ; the conusee shall have a re-extent, tho' the land was not delivered in execution, but the feignory. *Co. L. 290. a.*

So, a conusee of a recognizance by the *st. 23 H. 8. 6.* if he be evicted, shall have a re-extent. *Ibid.*

So, the executor or administrator of a recoveror, or conusee, shall have a re-extent upon conviction. *Ibid.*

If the judgment be removed into *B. R.* by error, and affirmed there, he shall have a *scire facias* out of that court. *Ibid.*

So, if the first extent or inquisition be insufficient, he may have a new extent. *Co. L. 290. a. Dy. 299. a.*

(D 8.) *When not.*] But if by the eviction the party is not totally ousted of his remedy for the residue of his debt, there shall not be a re-extent : as, if a part only be evicted. *Co. L. 289. b. 2 Cro. 338.*

If all but one acre be evicted ; for if he has a remedy *in presenti vel futuro* for the whole or part of the debt, he shall not have a re-extent. *Co. L. 289. b. 4 Co. 66. a.*

So, if he, who extends, be ousted by a subsequent extent upon a prior statute, he shall not have a re-extent ; for after the former extent satisfied, he who extended first shall have it again. *Co. L. 289. b. R. 4 Co. 66. a. Fulwood.*

Or, if he be ousted by a woman who claims dower. *Co. L. 289. b. R. 4 Co. 66. a.*

Or, by a lessee for life or years upon a lease made by the conusor before the statute. *Co. L. 289. b.*

Yet, by the *st. 8 Geo. 25.* if before or after filing the *liberate*, it be made appear to the *Chancery* that sufficient has not been extended or levied, &c. or any lands, &c. be evicted, the court may award a re-extent, one or more, and a *liberate* thereon.

So, after full satisfaction upon an extent returned and filed upon record, there shall not be a re-extent. *Co. L. 290. a.*

So, after an extent filed, there shall not be a re-extent, tho' several lands are omitted. *1 Sid. 356.*

So, in no case shall there be a re-extent, except where the first extent was void. *1 Sal. 39.*

(E) What Interest the Conusee shall have.

By the *st. de Marc. 13 Ed. 1.* the conusee shall have seisin of all the lands, &c.

And by the *st. 27 Ed. 3.* he shall have an estate of freehold, &c.

And therefore he has *quasi* the freehold, of which he may maintain an assise. *2 Vent. 327.*

So, the conusee may have *quasi* a reversion ; and if there was a prior lease, may distrain or have debt for the rent. *2 Vent. 328. R. 2 Cro. 424. 477. Vide ante (C).*

And

And a conusee must attorn to a grant of the reversion, as a tenant for life or years. *2 Vent. 328.*

So, if a rent be extended, he may avow a distress for rent. *Dy. 105. b. Dal. 34.*

But a conusee, in debt for rent, must shew the extent and inquiry returned upon it; and it is not sufficient to say, that it was delivered to him by extent. *R. 2 Cro. 569.*

So, a conusee shall hold by virtue of his first extent till the debt be satisfied, tho' part be evicted for life or years, or by a former extent, after such estate so evicted is determined. *R. 4 Co. 66. b.*

Till the debt with costs be satisfied. *15 H. 7. 15. b.*

So, a conusee may assign his interest. *4 Co. 66. Skin. 263. Vide Assignment (A).*

(F) How his Interest shall be determined.

BUT the interest of the conusee in the land determines by his release of the debt. *2 Vent. 327.*

So, a release to him, by him in the reversion, merges his interest. *2 Vent. 327.*

So, if the conusee purchases part of the inheritance, all his interest is merged. *2 Vent. 327. 1 And. 266.*

Or, takes a lease for years of the reversion after an estate for years. *R. Pal. 272.*

And thereby his interest is suspended during the years. *R. 2 Cro. 477.*

So, he may surrender to him in the reversion. *Vide Surrender (F).*

Or, forfeit his estate by a feoffment, &c. *2 Vent. 328. Vide Forfeiture (A).*

So, if a fine be levied of land after a statute extended, and five years passed, the interest of the conusee will be barred by such fine and non-claim. *2 Vent. 329. 332. Vide Fine, (I 2, 3.)*

If a conusee purchases or takes a lease, &c. of part of the estate extendible, his interest, by reason of the statute, is extinguished so entirely in the land purchased or demised, that his extent of it is void, and a second conusee may extend. *R. Pal. 272.*

So, the interest of the conusee shall be determined by satisfaction acknowledged upon record of the statute. *2 Vent. 336.*

So, by satisfaction from the profits according to the extended value. *2 Vent. 325.*

Or, by accidental profits.

But an extent shall not be determined as to goods or land by escape of the conusor. *R. 1 And. 266.*

Nor, by purchase of parcel of the lands, which the conusor had at the time of the recognizance or statute acknowledged. *R. 2 And. 171.*

(G) Remedy if the Conusee be satisfied.

IF the conusee be satisfied his debt, by any accidental profit, or by perception of the profits, the conusor shall have a *scire facias* against him *ad computandum*. *4 Co. 66. b. 2 Vent. 338.*

And upon such *scire facias* the conusee shall account according to the extended value, and not according to the real value.

And if by the extended value the conusee be satisfied, the conusor shall have judgment.

Or,

Or, if the conusor pay all that remains due upon the account, with damages. 2 *Vent.* 338.

So, if the conusee be satisfied by perception of the profits, tho' not by the extended value, the conusor shall be aided in equity; but shall pay the costs and damages which the conusee sustained, tho they exceed the penalty of the original debt. 2 *Vent.* 338. *R. Hard.* 136.

And by a bill in equity the conusor shall compel the conusee to account according to the real value by him received. 2 *Vent.* 338. *Hard.* 136.

But the conusor cannot enter without a *scire facias*, tho' by effluxion of time the debt and damages may be intended to be satisfied according to the value of the lands; for the conusee shall hold, till not only the debt and damages, but also his costs, labour, and expences are satisfied, which ought to be ascertained by the court. *R.* 4 *Co.* 67. *b.*

So, no one shall have a *scire facias* but the conusor; and therefore if the conusor, after the recognizance, grants a rent-charge, and the conusee be satisfied, the grantee may distrain, and in *replevin* it may be tried, whether satisfied or not. *R. Jen.* 456. *Cro. Car.* 598.

Vide more concerning *Statute-Staple* in *Dett.* (A 3.)—*Enfant.* (B 4.)

STEWARD.

Vide Copyhold. (C 5.—F 3.—R 5, &c.)—*Justices of the Peace.* (D 7.)—*Leet.* (M 1.)

Lord High Steward.

Vide Officer. (E 4.)

Steward of the King's Household.

Vide Courts (H.)

STYLE.

Style of a Court.

Vide Copyhold. (R 8.)—*Courts.* (P 6.)

King's Style.

Vide Roy (B.)

STRANGER.

Vide Fine. (I 2.)

Act of a Stranger.

Vide Abatement. (H 54.)—*Condition.* (L 14.)

SUBJECTS.

Vide Parliament. (L 11.)—*Prerogative.* (C 1, &c.—D 34, 35.)—*Trade.* (A 5, &c.)—*War.* (B 6, 7.)

SUBMISSION TO AWARD.

Vide Arbitrament, (D 1, &c.)

SUBORNATION.

Vide Justices of the Peace, (B 103. 105.)

S U B P Œ N A.

Vide Chancery, (D 1.)

SUBSIDY.

Vide Parliament, (H 13.)

SUBTRACTION OF TYTHES.

Vide Prohibition, (G 7.)

S U C C E S S I O N.

Vide Biens (D 1.)—Franchises, (F 16.)

S U G G E S T I O N.

Vide Grant, (G 9.)—Patent, (F 2.)—Prohibition, (H 2.)

S U I T.

Privilege of Suit.

Vide Attorney, (B 17.)—Dett, (G 11.)—London, (L 3.)—Prærogative, (D 85.)—Privilege, (C 1, 2.)

Continuance of Suit.

Vide Pleader, (V 1.)

Former Suit depending.

Vide Chancery, (I 1.)

Surceasing of Suit.

Vide Action upon the Case upon Assumpsit, (B 1.)

S U I T O F C O U R T.

Vide Copyhold, (K 13. 16, 17.)

Avowry for Suit.

Vide Temps, (G 14.)

S U M M O N S.

Vide Justices of the Peace, (C 2.—D 3.)—Parliament (C).—Process, (D 1. 9.—E 1.)—Sewers, (C 6.)

Summons and Severance.

Vide Assise, (B 10.)

SUNDAY.

Vide Temps, (B 3.)

SUPERSEDEAS.

IF a prisoner be not charged within the times allowed by the rules of the court, he may have a writ of supersedeas.]

[And when he is once supersedeable, he always continues so, while he remains in the same custody and under the same process. 1 *Term Rep.* 591.]

[But if a prisoner on *mesne* process be supersedeable for any irregularity, he cannot take advantage of that after he is charged in execution, if he had any opportunity of applying on that ground *before* he was charged in execution. *Id. ibid.*]

Vide Audita Querela, (E 5.)—*Certiorari*, (E—F—H 1, 2.)—*Chancery* (4 Q).—*Forcible Entry*, (D 28.)—*Pleader*, (3 B 12.)

SUPERSTITION.

Vide Justices of the Peace, (B 15.)

SUPERSTITIOUS USES.

Vide Uses (M).

SUPPLICAVIT.

Vide Chancery (4 R).—*Forcible Entry*, (D 16, 17.)

SUPPLY.

Vide Parliament, (H 9, &c.—17.)

SUPPOSAL.

Vide Pleader, (G 13.)

SUPPRESSION OF RIOTS, &c.

Vide Forcible Entry, (D 8.)—*Justices of Peace*, (B 9.)

SUPREMACY.

Vide Prerogative, (D 17.)

SUR CONCESSIT.

Vide Fine, (E 14.)

SUR CONUSANCE DE DROIT COME CEO, &c.

Vide Fine, (E 9.)

SUR CONUSANCE DE DROIT TANTUM.

Vide Fine, (E 12.)

SURETY.

Vide Bail (E).—Chancery, (4 D 6. 15.)

— of the Peace.

Vide Forcible Entry, (D 16, &c.)—Justices of Peace, (B 5, 6, 7.)

— of good Behaviour.

Vide Justices of Peace, (B 5. 8.)

SURGEON.

Vide Physicians (D).

SUR GRANT AND RENDER.

Vide Fine, (E 13.)

SURPLUSAGE.

Vide Pleader, (C 28, 29.—E 12.—S 28, 29.)

SURPRISE.

Vide Chancery, (4 D 22.)

SURRENDER.

(A) Surrender; what shall be, in Fact.

A Surrender is the resignation of a particular estate for life, or for years, to him in the immediate reversion or remainder. *Co. L. 337. b.*

A surrender shall be by exprefs words, or by operation of law. *Co. L. 338. a.*

An exprefs *surrender* does not require the word *surrender*; for any words *tantamount* are sufficient. *2 Rol. 497. l. 55.*

As, if a lessee grants that the lessor shall have his land, or grants his land to him. *2 Rol. 428. l. 2.*

Or, grants to him *totum statum suum*. *2 Rol. 497. l. 35.*

Or, leases to him for his life. *2 Rol. 497. l. 15.*

Or, says to him, *I agree you shall enter into the land*. *1 Leo. 280.*

Or, *I am content you shall have it*. *R. Cro. El. 488.*

So, a surrender will be good in the absence of him to whom made,
for

for his assent shall be presumed, if it does not appear to the contrary. *Cont. per three J. Vent. acc.* and the judgment of the *three J.* was affirmed in *B. R.* but afterwards reversed in parliament. 2 *Vent.* 199. *Ec. Sho.* 297. 3 *Mod.* 297. 3 *Lev.* 284. *Ca. Parl.* 151.

[If a lease come into the hands of the original lessor, by an agreement between him and the assignee of the original lease, "that the lessor shall have the premises as mentioned in the lease, and shall pay a particular sum, over and above the rent, annually, towards the good-will already paid by such assignee;" this agreement will operate as a surrender of the whole term; and the sum mentioned in the agreement will be considered as a sum to be paid annually in gross, not as rent. 1 *Term Rep.* 441.]

What shall be a surrender in law, *vide post.* (I 1, 2.)

(B) When without Deed.

A Surrender of an estate for life in land, by the common law, might be made without deed or livery; for nothing operates but the restoration of the particular estate to him in reversion or remainder. *Co. L.* 338. *a.* 2 *Rol.* 498. *l.* 23. 40.

Tho' it was originally created by deed. *Co. L.* 338. *a.*

So, *A.*, tenant for life, reversion to *B.* for life, they might join in a surrender without deed; for it will be first the surrender of *A.* and afterwards of *B.* 2 *Rol.* 498. *l.* 20. *R.* 2 *Rol.* 20. *Cro. El.* 269.

So, a joint-tenant might surrender to his companion (admitting that he may surrender) without deed. 2 *Rol.* 498. *l.* 43. *Vide post.* (E).

So, a lessee for years might surrender by *parol.* *R.* 1 *Vent.* 242. 272.

[Lease by deed, for any number of years, may be surrendered without deed, by note in writing, without stamp-duty. *Farmer v. Rogers*, *T.* 28 & 29 *G.* 2. 2 *Wilf.* 26.

(C) When not.

BUT by the common law, an estate, which lay in grant, and could not be created without deed, could not be surrendered without deed. *Co. L.* 338. *a.*

As, a corody, rent, &c. 2 *Rol.* 498. *l.* 30.

An office 1 *Vent.* 297.

So, if there be a feoffment to *A.* for life, remainder to *B.* for life, remainder in fee to *C.*; tho' the remainder to *B.* commenced without deed, it cannot be surrendered without deed. *Co. L.* 338. *a.* *R. per three J.* 2 *Rol.* 20.

So, a lessee for years of a manor could not surrender without deed. *R.* 2 *Rol.* 498. *l.* 35.

So, a corporation aggregate cannot make a surrender of their lands without deed. 10 *Co.* 67. *b.*

And now by the *stat.* 29 *Car.* 2. 3. no lease, estate, or interest of freehold, or term of years, or any uncertain interest, not being copyhold, in or out of any manors, lands, &c. shall be surrendered, &c. unless by deed or note in writing, signed by the party so surrendering, or his agent thereunto authorized in writing, or by act and operation of law.

(D) What Estate may be surrendered.

A Surrender regularly ought to be of a particular estate: as, of an estate for life or for years. *2 Rol. 494. l. 27.*

So, tenant by statute-staple, merchant, or *elegit*, may surrender. *2 Rol. 494. l. 44.*

So, a devisee for so many years, till he receives so much money, tho' he has only a chattel and no estate in the land. *2 Rol. 494. l. 40.*

So, if a lessee demises to his lessor for a less term rendring rent, he may surrender his reversion to his lessor, whereby the rent will be extinguished. *2 Rol. 494. l. 55.*

So, if there be a lessee of a term to commence after the death of *A.*, and a grantee of the inheritance makes a lease for 21 years, and then the lessee of the future interest assigns to the grantee of the inheritance, his interest will be emerged. *R. Cro. 619.*

So, a grant of the next avoidance will be surrendered by an acceptance of a grant of the next avoidance *de novo*. *Semb. 1 Bul. 33.*

So, tenant in dower, or by curtesy, may surrender, tho' their estate is created by law. *Co. L. 338. a.*

So, an estate of a thing, which lies in grant, may be surrendered to the terre-tenant, tho' it be an estate in fee: as, tenant in fee of a common, rent, &c. may surrender his interest to the terre-tenant. *Perk. f. 585.*

So, the tenant in a *præcipe*, or other real action, tho' he be seised in fee, may surrender his estate to the demandant without livery. *2 Rol. 494. l. 30.*

So, the tenant in a *cessavit*. *Qu. Perk. f. 585.*

(E) What not.

BUT regularly a tenant in fee cannot surrender his estate; and therefore the very tenant cannot make a surrender to his lord. *2 Rol. 494. l. 23.*

Tho' he be the very tenant of the king. *2 Rol. 494. l. 25.*

So, the discontinuee of tenant in tail cannot surrender to the issue in tail. *2 Rol. 494. l. 29.*

So, a joint-tenant cannot surrender to his companion. *2 Rol. 494. l. 10.*

So, a tenant at will cannot surrender properly. *1 Leo. 177, 8.*

So, a right cannot be surrendered; and therefore, a tenant for life being disseised, cannot make a surrender before entry. *2 Rol. 494. l. 49. Co. L. 338. a.*

Nor, a lessee for years being ousted.

Yet if the lessor waives his possession, the lessee, before entry, may surrender to him. *Perk. f. 603.*

So, if the lessee enters and assigns to *B.*, the assignee may surrender before entry; for the assignment gives him actual possession before entry. *R. 2 Rol. 425. l. 15.*

(F) To whom it may be made.

A Surrender ought to be to him who has the immediate reversion or remainder. *Co. L. 337. b.*

And

And to him who has the immediate reversion or remainder, a surrender may be, whether he has it in fee or in tail.

So, if he has it only for life. *2 Rol. 494. l. 12.*

So, a lessee for years may surrender to him who has the reversion only for years. *R. Cro. El. 302. Adm. 2 Vent. 327.*

Tho' the lessee be for several years, and the reversioner has it only for one year, or a less term. *Per Popb. and Fenner, Cro. El. 302.*

So, if a statute be extended, and afterwards there is another extent upon a later statute, the conversee of the former statute may surrender to him who has the interest in the last extent; for he has *quasi* a reversional interest. *Per Vent. 2 Vent. 327.*

And if the interest in both statutes comes to the same person, it amounts to a surrender of the former. *Skin. 263.*

If a lessee demises part of his estate to the lessor, he may surrender the other part; for the reversion of that remains in the lessor. *2 Rol. 494. l. 54.*

So, if a lessee for thirty years demises for ten years, both the lessees joining in a surrender, it will be good; for it shall be construed the surrender of the lessee for thirty years first, and then of the lessee for ten years, *Pl. Com. 541. a.*

So, a surrender to an infant will be good; for his assent shall be presumed till a disagreement appears. *R. 2 Vent. 208. Ca. Parl. 151.*

(G) To whom not.

BUT a surrender to him who has not any reversion in him, is void: as, if a reversion be granted to *B.*, a surrender to him by a lessee before attornment, (when the reversion does not vest till attornment,) is void. *Adm. Cro. El. 803.*

So, if a lessee for years to commence at *Michaelmas* surrenders before *Michaelmas* by deed, it is void; for till *Michaelmas* the lessor had not any reversion, in which it could merge. *Co. L. 338. a. Vide post. (I 1.)*

So, a surrender cannot be made, if the reversion or remainder be not immediate: as, if a lessee for thirty years leases to *B.* for ten years, *B.* cannot surrender to the first lessor. *Pl. Com. 541. a.*

If a statute be acknowledged to *A.*, and another to *B.*, and a fine levied by him in the reversion to *A.*, his estate is not merged; for the *mesne* interest of *B.* prevents the surrender of *merger* of his estate *Skin. 263.*

So, a surrender to a lessor, who disagrees to it, will be void. *Mar. pl. 10. 2 Vent. 207.*

(H) What will not be a Surrender,

SO, if a lessee, &c. reserves to him any part of the estate, it is not a good surrender: as, if he grants all his term to the lessor, except the last year, month, or day. *R. 2 Rol. 497. l. 30. 498. l. 5. 3 Bul. 203, 4.*

Or, leases to his lessor for his life; for he has a possibility to have it again. *2 Rol. 497. l. 5. 10.*

So, if the lessee agrees with the lessor by *parol*, that he shall have it rendering so much rent, it is not a surrender; for it appears that

rent

rent was intended to be reserved, which cannot be by *parol* upon a surrender, and, therefore, it will be only a lease at will. *R. Dy. 251. b. 2 Rol. 497. l. 45. 1 Leo. 177.*

So, if the lessee demises to the lessor and the heirs of his body, it will not be a surrender; for a special occupant is appointed. *2 Rol. 497. l. 37.*

So, if the lessee surrenders to the lessor to the use of another, the use cannot arise upon the estate extinguished by the surrender. *R. Pal. 359.*

So, if the lessee permits the lessor of a manor to hold a court there, and says generally in his presence, *I have nothing to do here*; it is no surrender. *Semb. 1 Leo. 280. 2 Leo. 49.*

Or, if the lessor says, *I will have such a chamber*, and the lessee agrees, and the lessor puts his goods there; it is no surrender of that part, but only a permission to put his goods there. *3 Leo. 224. Vide post. (I 2.)*

So, if the lessee delivers his lease to *A.* to deliver with all his estate to the lessor, and *A.* does accordingly; for he cannot make a surrender by attorney. *R. Cro. El. 488.*

So, if a lessee for years leases to *B.* for a less term, who regrants or releases to the first lessee, it is no surrender; but the first lessee shall have it for all the years. *Adm. Cro. El. 302. R. Cro. El. 173.*

So, if a lease be to *A.* for ten years, remainder to *B.* for twenty years, and *B.* releases all his right and estate to *A.*, he shall have it for thirty years. *Co. L. 273. b.*

(I) Surrender in Law.

(I 1.) What shall be.

SO, it shall be a surrender by operation of law, if a lessee for life enfeoffs him in the reversion in fee; for his estate will be merged. *2 Rol. 496. l. 42.*

So, if he grants to him *totum statum suum*. *2 Rol. 497. l. 35.*

So, if he enfeoffs husband and wife, seised of the reversion in right of the wife. *2 Rol. 496. l. 49.*

So, if lessee and lessor join in a feoffment, it will be the surrender of the lessee and the feoffment of the lessor. *Pl. Com. 140. b.*

So, a feoffment by a lessee for life to him in the reversion is a surrender; tho' the reversioner be an infant. *2 Rol. 496. l. 42.*

So, if lessee for life demises to him in the reversion, for the life of the lessee, it will be a surrender; tho' there be a possibility of an occupant. *2 Rol. 497. l. 15.*

Or, for the lives of the lessor and lessee; for it can never revert to the lessee. *R. 2 Rol. 497. l. 17.*

So, if a lessee for life or for years accepts a feoffment from him in the reversion or remainder, that amounts to a surrender of his estate. *2 Rol. 495. l. 25.*

So, if there be a feoffment to *A.* to the use of himself for life, and afterwards to *A.* and his heirs, and *A.* by *parol*, without deed, but upon an agreement that the feoffor shall have it again, makes livery to him upon the land; this amounts to a surrender of his estate, and also to a feoffment. *R. Dy. 358. a.*

So, if lessee for life accepts a lease from the lessor, it will be a surrender. *Al. 59.*

Tho' the new lease be only for years. *Ibid.*

So, if lessee for years accepts a new lease from his lessor, it will be a surrender in law; for this affirms him able to make a lease. *R. Pl. Com. 106. a. 107. b.*

Tho' the new lease be for a less term. *R. Dy. 140. b. 2 Rol. 495. l. 53. 2 Cro. 84.*

Or, by *parol*, when the first lease was by indenture. *Dy. 140. b. 2 Rol. 496. l. 3.*

Tho' the new lease commence at a future day, it will be a surrender immediately. *R. 5 Co. 11. b. Cro. El. 522. R. 2 Rol. 496. l. 5. R. Mo. 636. 2 Cro. 84. Per three J. Poph. 9.*

Tho' the new lease be defeazable. *2 Rol. 495. l. 40.*

Or, upon condition to be void, upon such an act which is afterwards done. *Pl. Com. 107. b.*

So, if he accepts a lease at will. *Mo. 637.*

So, if a lessee for years, to commence at *Michaelmas*, before *Michaelmas* accepts a new lease to commence immediately; it will be a surrender of the former lease, tho' it was only a future interest. *Co. L. 338. a.*

So, if before *Michaelmas* he accepts a new lease to commence also at a future day. *Co. L. 338. a. D. cont. 2 Rol. 496. l. 10. D. cont. Dy. 58. a. Per Moile and Davers cont. but Prisot acc. 37 H. 6. 18. a. Bro. Surrender, 21. Acc. 10 Co. 53. a. 67. b. Acc. Cro. Car. 502. 1 Rol. 728. l. 40. R. Cro. El. 522. 605.*

So, if a lessee accepts a new lease *de vestura terræ*, it will be a surrender. *2 Rol. 496. l. 20.*

So, if he accepts a grant of common or rent out of the same land, to commence at a certain day within the term. *R. 2 Rol. 496. l. 20. 25.*

Or, a lessee for life accepts a grant of a rent, common, &c. out of the same land for life. *R. 2 Cro. 177.*

Or, a lessee accepts a grant of the custody of the same land. *2 Cro. 177.*

So, if a woman, lessee, takes husband; acceptance of a new lease by the husband will be a surrender. *2 Rol. 495. l. 50.*

So, acceptance of a new lease by *parol* by a corporation aggregate, which has a former lease, will be a surrender, tho' they cannot surrender without deed. *10 Co. 67. b.*

So, if a lessee for years accepts a new lease from the guardian in *soilage*. *Semb. 1 Leo. 322.*

So, if the grantee of an office accepts a new grant of the same office, it will be a surrender. *Semb. 1 Vent. 297.*

So, if a corporation sole leases to *B.* who is afterwards made head of the corporation, as a bishop, master of an hospital, &c. his term is merged; for he cannot have the term in his own right, and the freehold in another right. *Co. L. 338. b.*

So, if a woman, lessor, takes to husband the lessee for years. *Co. L. 338. b. Semb. cont. 2 Cro. 275.*

(I 2.) What not.

But if lessee for life enfeoffs him in the remainder in tail, it will not be a surrender; for by the feoffment the remainder is divested. *2 Rol. 496. l. 45.*

Or, joins in a fine with him in the reversion, or remainder; for each gives that which he lawfully may. *Semb. Cro. El. 688.*

So, if a lessee reserves any interest in himself, it is no surrender. *Vide ante (H).*

So, if the lessor or reversioner enfeoffs the lessee for years, since the *ft. 27 H. 8.* to the use of another, his term is not surrendered or extinguished; for by the statute the interest of feoffees is saved. *R. 7 Co. 39. d.*

Or, by lease and release conveys to the lessee and another, to the use of *B.* *Dub. 2 Lev. 127.*

So, if the lessee accepts a new lease, in trust for another. *Semb. 1 Sid. 75.*

So, if the new lease be void, acceptance by the lessee is no surrender. *R. 2 Rol. 495. l. 45. Jen. 405.*

So, if the new lease commences after the death of *B.*, it is no surrender till *B.* dies; for he may survive the first term. *R. 4 Leo. 30.*

So, if a lessee accepts a grant of a thing consistent with the lease of the land, it is no surrender; as, if the lessee of a manor accepts the grant of a bailiwick, or to be steward of the same manor; for it is collateral. *R. 2 Rol. 496. l. 30. Qu. Mo. 637. R. 2 Cro. 84. 176. Hard. 47.*

Or, the lessee of a park accepts the grant of parker. *R. 2 Rol. 496. l. 36. 2 Cro. 177.*

Or, *à contra.* *Cont. per two J. 1 Rol. 83.*

If the lessee of an house accepts a grant of the custody of the same house. *Hard. 47.*

So, if the lessor grants a rent, common, &c. out of the land to his lessee, without saying at what time it shall commence, it is no surrender; but it shall be intended after his term. *R. 2 Rol. 496. l. 16. 2 Cro. 177.*

Or, leases to him all his lands in *A.* where the lands in the former lease are; for it shall be intended of all his other lands. *2 Rol. 496. l. 13. 2 Cro. 177.*

Or, agrees that the lessee shall have part of the former lands and other lands for a less term, and that it shall not be a surrender. *R. 1 Leo. 303. Cro. El. 173.*

So, an agreement between the lessor and a stranger, that the lessee shall have a new lease, is no surrender. *Cro. El. 173.*

So, if the lessee gives licence to the lessor to make livery, it is no surrender. *R. 2 Rol. 495. l. 35.*

Or, to make a feoffment. *Per Fitzb. Dy. 33. b.*

Or, agrees that he shall make a feoffment. *Dub. Dy. 33. b. 2 Rol. 495. l. 27. Mo. 11.*

Or, be attorney to make livery for him. *2 Rol. 495. l. 37. R. Mo. 11.*

So, if the king grants an office by patent, acceptance of a new patent of the same office is no surrender of the first. *R. Cro. Car. 197.*

So, if the king makes a demise for years, acceptance of a new lease without recital of the former will be void, and is no surrender. *Cro. Car.* 198.

So, if husband and wife, seised for the life of the wife, accept a feoffment from the reversioner, it will be a surrender only during the coverture; for the wife, after the death of her husband, may waive it. *Vide Baron and Feme* (R).

So, if a woman, lessee for years, takes an husband who accepts a new lease, and the wife survives. *R. Mo.* 637.

So, if a new lease be made to an infant, it is no surrender, if he does not agree to it at full age. *Cro. Car.* 502.

So, if an idiot, or *non compos*, makes a surrender, it will be void. *R. Comb.* 438. 468.

So, if a lessee surrenders part of the estate, it will be a surrender only for that part. *2 Rol.* 498. *l.* 51.

If he accepts a new lease of part. *R. 2 Rol.* 498. *M.*

If a lessor leases *de novo* to his lessee and another, it will be a surrender only for a moiety. *Dub. 2 Lev.* 127.

If the lessee of a corporation aggregate be made the head of the same corporation, it is no surrender. *Co. L.* 338. *b.*

So, if the lessor takes in marriage a woman, lessee; for he may have the freehold in his own right, and the term in the right of another. *Co. L.* 338. *b.* *R. Pl. Com.* 418. *b.*

Or, if the lessee makes the lessor his executor. *Co. L.* 338. *b.*

(K) In what Manner a Surrender may be.

A Lessee may surrender upon condition; and if the condition be broken, the particular estate shall be revested. *Co. L.* 218. *b.*

So, upon a surrender, reserving rent, tho' the rent is not good by way of reservation, yet it shall be so by way of contract. *R. 2 Lev.* 80. *1 Vent.* 242. 272.

Tho' the surrender be by assignment, &c. by *parol*. *R. 2 Lev.* 80. *1 Vent.* 242. 272.

So, if tenant for life joins in a feoffment or fine with him in the reversion, rendring rent to the lessee for life; the rent will be good. *Cro. El.* 688.

So, a surrender may be made of land in the county of *B.* at a place out of the county. *2 Rol.* 495. *l.* 5.

(L) The Effect of a Surrender.

(L 1.) The Estate is absolutely determined between the Parties.

IF an estate be surrendered, the whole estate is determined without other ceremony.

And, as to the parties themselves, it will be determined to all intents. *Co. L.* 338. *b.*

And, therefore, if an husband, seised in right of his wife, leases for the life of *B.* which is a discontinuance, and afterwards *B.* surrenders his estate to the husband, the discontinuance is determined. *Co. L.* 338.

If *A.* mortgages his reversion in fee to the lessee for years, whereby his term is surrendered, and afterwards pays the money pursuant

suant to the condition, yet his term shall be extinguished, and not revive. *R. 3 Leo. 6.*

(L. 2.) Or, for the Benefit of a Stranger.

So, by a surrender the estate will be absolutely merged for the benefit of a stranger. *Co. L. 338. b.*

As, if a bishop has a rent-charge in fee, and the terre-tenant enfeoffs him, whereupon the lord enters for *mortmain*, he shall have it discharged of the rent. *Ibid.*

If a reversioner makes a lease, grants a rent-charge, &c. and afterwards the lessee of the particular estate surrenders, the lease, or grant of the reversioner, takes effect immediately. *Ibid.*

If *A.* makes a lease to *B.* for life, rendring rent to him and his heirs, remainder to *C.*, the reversion to himself, and afterwards grants the reversion to *C.* to whom *B.* attorns, yet *C.* shall not have the rent, but the heir of *A.* *Co. L. 338. b.*

So, by a surrender the estate will be merged, tho' it be to the disadvantage of him who assents; as, if the reversioner grants a reversion for life to which the lessee attorns, and afterwards releases to the grantee and his heirs, tho' the lessee shall be now punished for waste, where he was punishable upon the grant of the reversion for life; yet, because he has attorned to the grant, the estate of the grantee for life shall not have continuance. *Co. L. 338. b.*

(L. 3.) But not to his Prejudice.

But the estate shall have continuance notwithstanding the surrender, to avoid a prejudice to a stranger. *Co. L. 338. b.*

As, if a reversion upon the life of *B.* be granted with warranty, and afterwards *B.* surrenders, the grantee shall not have execution in value against the grantor, who is a stranger, during the life of *B.* *Co. L. 338. b.*

If tenant for life or years grants a rent-charge, common, &c. and afterwards surrenders; yet the rent, &c. continues. *Co. L. 338. b.*

(M) When a Charge revives by the voiding of a Surrender.

SO, a charge made before the surrender revives, if the surrender be avoided, against him, who claims *paramount* the surrender; as, if lessee for life grants a rent-charge and afterwards enfeoffs the grantee, and the lessor enters for the forfeiture, the rent revives; for the lessor claims *paramount* the feoffment. *Co. L. 338. b.*

So, if grantee for life of a rent accepts a lease of the land from him in the reversion, and afterwards the lease is surrendered, the rent revives. *R. per three J. Brampton cont. Cro. Car. 101.*

(N) Surrender; how pleaded.

IF a surrender be by acceptance of a new lease, it is not good to say, that the lessee, being possessed by a former lease, the lessor demised to him, but that the lessee surrendered, and then the lessor demised, or that the lessor entered and demised. *Semb. per Dy. Pl. Com. 194. b.*

So, regularly he ought to plead, that he surrendered the estate and land. *Cro. Car.* 101.

So, regularly, he ought to shew that the lessor assented to it, where the other party pleads or brings an action in disaffirmance of the surrender. *2 Vent.* 207.

But the omission will be aided after verdict.

And it is not of necessity. *Semb. 2 Vent.* 207.

But if the party pleads a surrender of the demise *aforsaid*, it is sufficient. *R. Cro. Car.* 101.

So, he need not shew that the lessor entered after agreement to the surrender. *Ibid.*

Vide more concerning *Surrender in Bail*, (Q 2, &c.—R 3.)—*Fine*, (E 11.)—*Franchise*, (G 2.)—*Officer*, (K 9.)—*Patent* (G).

Surrender of a Copyhold,

Vide Copyhold, (F 1, &c.)

SURREBUTTER,

Vide Pleader (L),

SURREJOINDER.

Vide Pleader (I).

SURVEYOR OF HIGHWAYS,

Vide Chimin, (C 1, &c.)

SUSPENSION.

(A) Suspension; what shall be.

IF a feignory, rent, or other profit *apprendre* out of lands, comes to him who has possession of the same land for a time, such unity of possession creates a suspension of the feignory, rent, &c. for the time. *Co. L.* 313. a.

As, if *A.* be tenant for life, remainder to *B.* in fee, and the lord grants his services to *A.* in fee, they are suspended during the life of *A.* *Lit. f.* 560.

So, if there be lord and tenant, and the tenant grants his tenancy to *A.* for life, and then the lord grants his feignory to *A.* in fee, the feignory will be suspended during the life of *A.* *Lit. f.* 562.

So, if *A.* disseises the tenant, or the tenant grants to *A.* in fee upon condition, and then the lord grants to *A.* in fee, and afterwards the disseisee enters, or the tenant enters for the condition broken, the services revive, and are not extinguished, tho' *A.* had a fee; for he had not so perdurable an estate in the tenancy as in the feignory. *Co. L.* 313. b.

So, if the tenant leases to the lord for life, or for years, or encloses him upon condition, the feignory is suspended. *Co. L.* 314. a.

Or,

Or, if the lord disseises his tenant, the feigniori will be suspended till the entry of the disseisee. *Co. L. 314. a.*

So, if the tenant marries a woman who has the feigniori, it will be suspended during the coverture. *Sav. 21.*

If *A.* seised of lands held of the manor of *B.* be attainted for high treason, and the king grants his lands to *D.*, the rent payable to the manor of *B.*, tho' suspended by the attainder, shall be revived and paid by the patentee. *R. Ley. 1.*

(B) What shall be an Extinguishment.

BUT if a man has as high and perdurable an estate in the feigniori, rent, common, or other profit *apprendre*, as in the land, such profit *apprendre* will be extinguished. *Co. L. 313. a. Lit. f. 561.*

As, if he who has a feigniori, rent, common, &c. releases his estate or interest to the terre-tenant. *Vide Release, (B 6.)*

Or, the lands out of which a rent, &c. issues, come to the lord by purchase, descent, or other lawful means. *R. Jon. 234.*

If a manor, to which common for the lord and his copyholders belong, in the waste of the king and others, comes to the king by the statute of dissolutions, &c. the common of the lord in the waste of the king is extinguished; but not the common of the copyholders, nor the common which the lord himself has in the waste of others. *R. Jon. 349.*

So, if the land out of which a rent, &c. is granted, be evicted by an elder title, the rent will be extinct. *Co. L. 147. a.*

So, every customary payment or privilege for the profit of the lord will be extinguished by unity of possession in fee; as, if the lord purchases the land held of him, all the services are extinct.

So, an heriot, fine, &c. due by custom upon death, alienation, &c.

A custom to be beadle to the lord, collector of his rents, &c. *Bro. Exting. 14.*

So, an easement; as, a way. *R. Cro. El. 300. R. 1 Rol. 935. l. 45.*

Usage to repair fences between such and such closes. *R. 1 Vent. 97. Ray. 192. R. Pal. 446.*

So, a liberty of placing pipes for water, if the pipes are taken away during the unity. *Pal. 446.*

But things of necessity, and collateral, are not extinguished; as, a way of necessity, gutter, water-course, &c. *R. Pal. 446. Jon. 145, 6.*

So, extinguishment, or suspension by law, may be prevented in equity. *Vide Chancery, (4 N 6. 8.)*

(C) When by Extinguishment of Part the Whole will be extinguished.

IF a man has a profit *apprendre* out of land against common right, and he purchases part of the land out of which, &c. the whole will be extinct; as, if the grantee of a rent-charge purchases parcel of the land; for the rent is entire, and issues out of every part of the land. *Co. L. 147. b.*

So, if a commoner of common appurtenant purchases part of the land out of which. *Vide Common (L).*

So, if a grantee of a rent-charge recovers part of the land by a feigned title; for he claims under the grantor. *Co. L. 148. b.*

So, if the conusee of a statute purchases part of the land of the conusor, the whole shall be extinct. *Sav. 69. R. Jon. 445.*

Or, if he disseises the conusor of part, he cannot take execution of the residue, till the disseisin purged. *Jon. 445, 6,*

So, if a thing be due by common right, by the act of him to whom due, the whole may be extinguished; as, if a tenure be by entire service, annual or casual, if the lord himself purchases part, the whole will be extinct. *6 Co. 1. b. R. 8 Co. 105. b. Co. L. 149. b.*

If the lord releases his feignory to part, the whole feignory will be extinct. *6 Co. 1. b.*

So, if the lord comes to part, partly by his own act, and partly by default of the party; as, if he recovers in a *cessavit*. *R. 6 Co. 2. b.*

So, if the lord comes to part by act of law, where another will have prejudice; as, if the lord by descent comes to the part of a joint-tenant, who holds by suit of court, the whole will be extinct; for by the *st. Marl.* the other joint-tenants shall have contribution. *R. 6 Co. 2. a.*

Otherwise, if the service due be not for the sole benefit of him to whom due, but also for the public good; as, a thing for the defence of the realm, advancement of justice, charity, &c. *6 Co. 2. a. Vide post. (F).*

But if the king purchases part of the lands subject to his debt, he shall have execution upon the residue. *R. Sav. 69.*

(D) Or, by Suspension of Part, the Whole will be suspended.

SO, if a tenant makes a gift in tail, or a lease for life, or for years, of part of his land to his lord, the whole rent will be suspended; for rent-service cannot be suspended for part by the act of the party, and *in esse* for the other part. *Co. L. 148. b.*

So, if the lessor enters upon the lessee for life, or for years, and ousts him of part of the land, the whole rent will be suspended. *Ibid.*

So, if there be a lease of a warren in three *vills*, rendering rent, and the lessor grants the reversion of the warren in one vill, the whole rent will be suspended; for rent due by contract shall not be apportioned; but perhaps the lessor will have a remedy upon his contract. *R. 3 Leo. 1. 1 And. 26.*

(E) When there shall be an Apportionment.

BUT a thing of common right shall be apportioned; as, if a man who has a rent-service purchases part of the land, the rent, if it be not an entire thing, shall be apportioned. *Lit. f. 222.*

And this was by the common law, and not by construction upon the statute *quia emptores terrarum*. *Co. L. 148. a. Cont. Dy. 4. b.*

The rent-service shall be apportioned, if the lessee for life or for years surrenders part of the land to the lessor. *Co. L. 148. a.*

So,

So, if the lessor grants or devises part of the reversion to another. *Co. L. 148. a. R. Cro. El. 771.*

Or, enters into part for a forfeiture. *Co. L. 148. a. Dy. 5. a.*

Or, recovers part of the land in waste. *Co. L. 148. a.*

So, if part of the land out of which the rent issues is evicted. *Semb. 2 Cro. 160.*

So, if a man, who has common appendant, purchases parcel of the land, the common shall be apportioned. *Vide Common (L).*

So, if *A.* seised of one acre in fee, of another in tail, leases for life or years, or makes a gift in tail, reserving rent, and dies, whereon the issue in tail enters, the rent shall be apportioned. *Co. L. 148. b.*

So, a thing against common right sometimes may be apportioned; as, if a rent-charge in fee be granted by devise or fine, a moiety to *A.* in fee, a moiety to *B.* in fee, and no attornment is necessary. *R. 2 Lev. 240.*

If rent be apportioned in an action for the rent, the defendant may shew the value of the land, and at what rate the apportionment shall be made. *R. 1 Vent. 276. Semb. Cro. El. 771. 2 Cro. 160.*

Or, upon *nil debet*, it may be apportioned by the jury. *1 Vent. 276.*

So, rent may be apportioned in equity, when it shall not by law. *Vide Chancery, (2 E.—4 N 5.)*

[If *A.* appoint *B.* his collector, and direct *B.* to take and receive to his own use 100*l.* out of the first money he collects, this is an *entire agreement*, and *B.* cannot maintain an action on it for 75*l.* as for three quarters of a year's salary. *Plymouth v. Throgmorton, B. R. H. 3 Jac. 2. 1 Salk. 65. 3 Mod. Rep. 153. S. C.*]

[If a sailor, hired for a voyage, take a promissory note from his employer for a certain sum, provided he proceed, continue, and do his duty on board for the voyage, and before the arrival of the ship he dies, no wages can be claimed either on the contract or on a *quantum meruit*. *Cutter v. Powell, B. R. T. 35 Geo. 3. 6 T. R. 320.*]

(F) Or, a Suspension only for Part.

SO, by act of law a thing may be suspended in part, and *in esse* for part; as, if the lord in *chivalry*, as guardian, enters upon the land of his tenant within age, whereby the rent is suspended during the minority; yet if the wife recovers dower, she shall pay a third part of the rent. *Co. L. 148. b.*

So, if the tenant makes a gift in tail to the father of the lord of part of his land, which descends to the lord, the seigniorship shall be suspended for part, and *in esse* for part. *Co. L. 148. b.*

So, if the terre-tenant makes a gift to the father of the grantee of a rent-charge of part of the land charged. *Co. L. 148. b.*

So, by the act of a stranger; as, if one joint-tenant or parcener disseises the tenant, the other may distrain for his moiety of the rent. *Co. L. 148. b.*

So, if one joint-tenant of a seigniorship purchases the tenancy, one moiety is extinct, and the other moiety shall be held of the other joint-tenant. *Semb. 21.*

(G) When all the Services, &c. remain, and are not apportioned or extinguished.

SO, if *A.* be seised of one acre in fee, and another in tail, and grant a rent out of both in fee, in tail, for life or years, and die, where by the acre in tail is discharged, the whole rent remains upon the other acre; for he shall not take advantage of the imbecility of his estate to defeat his grant, *Co. L. 148. b.*

So, if a tenant holds by entire services, he shall not make an apportionment by his own act; but the services are multiplied; as, if tenant of three acres by homage, fealty, suit, &c. enfeoffs *A.* of one acre, *A.* shall do the same services entirely, and also the feoffor for the residue. *R. 6 Co. 1. a. R. 8 Co. 105. b.*

Or, by service of a hawk annually; for an entire annual service shall be multiplied, as well as casual. *R. 6 Co. 1. a.*

So, tho' the entire annual service be a matter of profit; as, an horse, ox, &c. as well as where it is a hawk, dog, or other matter of pleasure. *R. 8 Co. 105. b.*

So, if the tenant holds by a personal service to be done by the person of a man; as, the service of *chivalry*, to be sewer, butler, &c. if the tenant aliens parcel, the service shall be multiplied, where it can be done without prejudice to the lord; as, in service of *chivalry*, if it cannot be multiplied without his prejudice; as, to be butler, &c, the service remains, but shall not be multiplied. *R. 8 Co. 105. b.*

So, in services for the public good; as, for defence of the realm, advancement of religion, justice, charity, &c. tho' they are entire, the act of the lord himself shall not make an extinguishment, but they remain; as, if the lord purchases part of the land held by *chivalry*, *escuage*, *castle-guard*, *cornage*, &c.; for the service is for defence of the realm. *6 Co. 2. a.*

Or, by the service of making a bridge, beacon, repairing an highway, &c. *6 Co. 2. a.*

Or, by the service of finding a preacher in such a church, marriage for a poor virgin, &c. annually. *6 Co. 2. b.*

Or, by service to aid the sheriff, to be high constable, keep the king's records, &c. *6 Co. 2. a.*

So, a thing collateral to the land shall not be extinct by unity of possession; as, if an abbot, &c. was seised in fee of lands out of which tythes are payable, and of the rectory to which; for when the union ceases, the tythes revive. *Vide Disines, (E 9.)*

If *A.*, having a warren in the land of *B.*, purchases the land, the warren is not extinct; but when he aliens the land, it revives. *Bro. Exting. 5.*

So, *shack* common, or by reason of *vicinage*. *R. 1 Rol. 935. l. 36.*

So, the privilege of a manor within the *purview* of a chase, to hunt within the chase, is not lost, if the manor and chase come to the king, who afterwards aliens the manor. *Dy. 327. a. 1 Rol. 935. l. 40.*

So, if *A.*, having a portion of tythes out of the rectory of *B.*, purchases the rectory, the portion is not extinct. *R. 2 Rol. 161.*

So, a matter of necessity will not be extinct, by unity of possession; as, a way of necessity. *1 Rol. 936. l. 2. Vide Chimin, (D 4.)*

So, if, by custom in *London*, the owner of a tenement has a gutter in

in a tenement adjoining, and afterwards purchases the tenement in which, and after that aliens again, the alienee cannot stop the gutter; for it was as necessary afterwards as before. *Bro. Extng.* 60. *Per Cur.* 11 *H.* 7. 25. *b.*

If the close of *A.* ought to repair the fence of *B.* who purchases the close of *A.* in fee and dies, whereby the closes are divided between the daughters, the prescription continues. *Dub. Dy.* 295. *b.*

So, a thing which runs with the land will not be extinct by unity of possession; as, if the lord purchases land of the nature of *gavel-kind* or *borough English*, the custom remains. 11 *H.* 7. 25. *b.*

The custom of *free-bench.* *Bro. Extng.* 14.

So, if the lord purchases part of the land, where by custom an heriot is due upon the death of every tenant, the heriot shall not be extinct. *Co. L.* 149. *b.* 8 *Co.* 106. *b.*

So, where a lessor has land by contract from an under-lessee, no rent shall be suspended contrary to the agreement of the parties; as, if *A.* leases to *B.* for twenty-one years, rendring 20 *l.* *per annum*, and *B.* leases to *C.* rendring no rent for ten years, and *C.* assigns his term to *A.*, the rent of *B.* shall not be suspended or apportioned, but he shall pay 20 *l.* *per annum* as before, *R.* 2 *Lev.* 143.

SWANIMOTE COURT,

Vide Chase, (R 2.)

SWEARING.

Vide Justices of Peace, (B 23.)

SYNONIMOUS WORDS.

Vide Covenant, (D 2.)

T A I L.

Vide Estates, (B 1, &c.) and the several titles referred to under *Tenant in Tail.*

T A L L A G E.

Vide Ancient Demesne, (F 3.)—*Parliament,* (H 9, &c.)

T A R D E.

Vide Return, (D 1.)

T A X E S.

Vide Chancery (4 T).—*Parliament,* (H 9, &c.)—*Scotland,* (D 8.)—*Sewers,* (E 1, &c.)

TEMPORAL COURTS.

Vide Dismes, (M 5)

TEMPORAL JURISDICTION.

Vide Heresy, (B 4.)—Prerogative, (D 28, &c.)

TEMPORAL LORDS.

Vide Parliament, (D 3.—G 10.)

T E M P S.

(A) Time ; how computed ; inclusive or exclusive.

HOW the year, month, day, shall be computed, *vide Ann.*
When by the calendar or lunar month, *vide Ann.*

If a thing be limited to be done within such a time after such a fact, the day of the fact shall be taken inclusive ; as, where the *st. 27 Eliz. 18.* requires an action against the hundred within a year after the robbery, the day of the robbery shall be included within the year. *Per two J. one cont. Hob. 139. 2 Rol. 520. l. 47. [Vide Doug. 465. Vide Hundred, (C 4.) Vide 3 T. R. 623. acc.]*

[So, when the law requires that a month's notice of an action shall be given, the month begins with the day on which the notice is served. *3 T. R. 623.*]

[A permit for the removing of wine from one place to another under the *stat. 26 Geo. 3. c. 59. s. 30. & 35.*, dated nine o'clock in the morning one day, and giving the party one hour for removing it out of A.'s stock, and two days more for delivering it into B.'s stock, expires at ten in the morning of the second day after it is granted. *Cooke v. Scholl, B. R. E. 33 Geo. 3. 5 T. R. 255.*]

But where it is limited within such a time after the date of a deed, &c. the day of the date shall be taken exclusive ; as, a protection shall be for a year, exclusive of the day of the date. *Hob. 139.*

By the *st. 27 H. 8. 16.* it is sufficient if a deed be inrolled within six months, exclusive of the day of the date. *Hob. 139. Vide Bargain and Sale, (B 8.)*

[In temporal cases, time is computed by lunar months ; in ecclesiastical, by solar. *1 Bl. Rep. 450.*]

[Therefore a month's time to plead, is a lunar month. *Ibid. Doug. 463.*]

When the commencement of a lease is exclusive of the date or not, *vide Estates, (G 8.)*

(B) Of what Times the Law takes Notice.

(B 1.) Of a Year and a Day.

THE law takes notice of the commencement and course of the year, and all times which depend upon the calendar. *Vide post.*

(B 2.) *Vide Ann.*

So, of the commencement and end of the term. *1 Sid. 304.*

And, therefore, if there be a promise upon forbearance till *Easter term* ; it is sufficient to say, that he forbore accordingly, without saying what day that was. *R. 2 Cro. 548.* [Altho'

[Altho' the law does not in general allow of the fraction of a day, yet it admits it in cases where it is necessary to distinguish. 3 Burr. 1434.]

[The day may be divided to answer the real ends of justice. Dyer, 345. Salk. 625. 3 Wils. 274. 3 Burr. 1241. 1434.]

[And there is no reason why the very hour may not be divided, where it is necessary, and can be done; for it is not like a mathematical point which cannot be divided. 3 Burr. 1434.]

(B 2.) Of the Calendar.

So, the judges may take notice of the calendar; as, if an inferior court be held 16th *February*, the court may take notice by the *almanac* that it was upon a *Sunday*, without trial by the country. R. Cro. El. 227. 1 Leo. 328.

So, of moveable feasts as well as immoveable, and the course of the moon, upon which they depend, the court will take notice by the almanac; for, without that, they do not know the one or the other. Mod. Ca. 160. 196.

So, the calculation of *Easter*. Mod. Ca. 196.

So, if a court be alleged *die Mercur*. 3 *die M*. where the 3 *dies M*. was *dies Luna*, it is error. R. 1 H. 7. 12. b.

Or, *die Jovis super festum S. Andra*, where that feast was *die Veneris*. 1 H. 7. 12. b.

But where a time is mentioned, not fixed by the calendar, it ought to be specially averred; for otherwise the court does not take notice of it; as, if a leet be alleged 18th *April*, tho' that be within a month after *Easter*, yet the court need not take notice of a moveable feast. Jon. 301.

If a breach of covenant be alleged 20th *June*, they need not take notice whether it be within *Trinity* term; for the end and commencement of *Trinity* and *Easter* terms not being fixed by the calendar, the court need not take notice of them. Semb. 1 Sid. 308. R. per three J. Cro. El. 210.

If a writ of inquiry be returnable *die Luna post*. 15 *Hilar.*, and executed 27th *January*, the court need not examine whether it be before or after the return. R. Cro. Car. 53.

So, tho' it has relation to a time known by the calendar; as, if a man promise payment at *Whitsuntide* fair, in *assumpsit* after *Whitsuntide*, it must be averred that *Whitsuntide* fair is passed, otherwise it is error; for the court does not take notice of it. R. 1 Rol. 29. l. 45.

So, where the calendar shews the time, the court, after execution done, need not consult it to avoid the debt, tho' they will examine it before execution. 2 Jon. 228.

Yet they may take notice, if it be mentioned *ore tenus*, as well as if it was assigned upon the record. Mod. Ca. 196.

[By *st.* 24 Geo. 2. c. 23. the calendar is corrected, and new style established. The year 1752 to begin 1st *January* 1752, and the day after the 2d *September* 1752 to be accounted the 14th *September*.]

(B 3.) De Die Dominico.

The award of any judicial process upon a *Sunday* is void. Jon. 156.

So,

So, the entry of any judgment upon record. *Jon.* 156.

So, if judgment be given upon a *Sunday* in an inferior court, it will be void. *R. Cro. El.* 227. *1 Leo.* 328. *3 Burr.* 1595. *1 Bl.* 496. 526.

So, the return of a writ by a sheriff. *R. Mod. Ga.* 148. 159. 196.

[A writ of inquiry executed on a *Sunday* is naught, and advantage may be taken of it on writ of error, tho' not assigned for error. *Lord Cornwallis v. Hoyle*, *M.* 6 *Geo. Fort.* 373.]

[If the vouchee die on the return day of the writ of summons falling on a *Sunday*, the recovery will not be good. *1 Bl. Rep.* 526.]

So, now by the *st.* 29 *Car.* 2. 7. if any serve or execute process, warrant, order, judgment, or decree, (except for treason, felony, or breach of the peace,) it shall be void to all intents, as if done without process, warrant, &c.

And therefore false imprisonment lies for it. *1 Sal.* 78. *5 Mod.* 95.

[A service of notice of declaration is bad, tho' the defendant accept it, knowing it to be irregular. *Morgan v. Johnson*, *C. P. E.* 31 *Geo.* 3. *1 H. Bl.* 628.]

And prohibition to the spiritual court, if the proceeding be upon process issuing from thence. *Semb.* 5 *Mod.* 449.

[And one who is convicted on a penal statute cannot be apprehended on a *Sunday* for the forfeiture. *Rex v. Myers*, *E.* 26 *Geo.* 3. *1 T. R.* 265.]

But before the *st.* 29 *Car.* 2. 7. all ministerial acts upon a *Sunday* were lawful, tho' not judicial; as, an arrest by an officer upon process. *R.* 9 *Co.* 66. *b.* 2 *Cro.* 280. *Godb.* 280. *2 Bul.* 72.

So, by the *st.* 29 *Car.* 2. 7. execution of process, warrant, &c. in cases of treason, felony, or breach of the peace, is allowed.

And execution of a warrant of justices of peace for good behaviour is lawful within this exception. *R. Ray.* 250. Before the statute it was held *cont.* *Cro. Car.* 602.

So, an information may be exhibited on a *Sunday* upon a special law. *R. Jon.* 156.

So, if a defendant arrested on a *Saturday* escapes, he may be retaken upon the *Sunday*; for that is not an execution of process, but a continuance of the former imprisonment. *Mod. Ca.* 231.

[*A.* was arrested at the suit of *B.*, and discharged, the sheriff not knowing that there was a detainer in his office at the suit of *C.*; on the *Sunday* following he was arrested at *C.*'s suit, and discharged by the court by virtue of the *stat.* 29 *Car.* 2. *c.* 7. *f.* 6. it being considered as an original taking. *Atkinson v. Jameson*, *B. R. M.* 33 *G.* 3. *5 T. R.* 25.]

So, bail may seize their principal on a *Sunday*. *Ibid.*

[But sheriff's bail cannot take the defendant on a *Sunday*, in order to surrender him. *2 Bl. Rep.* 1273.]

So, a person may be taken upon an escape warrant on that day; for it is in the nature of a taking upon fresh suit. *R.* 6 *Mod.* 95. *2 Ld. Raym.* 1028. *2 Salk.* 626. *3 Salk.* 148. *S. C.*

[A person may be arrested on a *Sunday* on an attachment for a rescue. *Anon. C. P. E.* 17 *Geo.* 2. *Willes*, 459.]

[A person may be arrested on *Sunday*, on Lord Chancellor's warrant, on an order of commitment for contempt; for he is considered

as in custody from the time of making the order, and the warrant is directed to the gaoler, and is in the nature of an escape-warrant. *Semb. Whitechurch's case, P. 1749, 1 Atkyns, 55. 1 T. R. 265.*

[A person may surrender voluntarily on a Sunday. *Ibid.*]

[Process on an indictment, an attachment for a contempt may be served on a Sunday. *Ibid.*]

[A man may be taken on attachment, for non-performance of an award, on a Sunday. *Ibid. 1 T. R. 266. contra.*]

[A rule nisi for an attachment for non-payment of money pursuant to the master's *allocatur*, cannot be served on a Sunday. *M'Ilham v. Smith, B. R. M. 39 Geo. 3. 8 T. R. 86.*]

So, a proclamation upon summons may be made on a Sunday, according to the statute 31 *El. 3. Semb. per Holt, 5 Mod. 449.*

So, a citation out of the spiritual court may be published at the door of the church on a Sunday, according to the usage of the court, tho' it cannot be served upon the person. *Semb. per Holt, 5 Mod. 450. Garth. 504.*

So, *hue and cry* may be made upon a Sunday. *R. Godb. 280.*

And if the hundred refuse to make it, they shall be punished for the neglect. *Per three J. Mont. cont. Godb. 280.*

[So, parliament may sit on a Sunday, as it did *Oct. 26th, 1760*, on the demise of the king. *1 Bl. Rep. 499.*]

By the *st. 1 Car. c. 1.* continued by the *st. 3 Car. 4.* and *16 Car. 4.* if any assemble on the Lord's day out of his parish for sports, or in his parish use bear or bull-baiting, interludes, or unlawful pastimes, if convicted by any justice of peace on view, by confession, or one witness in a month, he shall forfeit *3s. 4d.* for every offence, to be levied by distress and sale, &c.; and for want of distress, be set in the stocks three hours.

By the *st. 1 Jac. 22.* shoemaker, &c. who shews for sale any shoes, boots, &c. on Sunday, shall forfeit *3s. 4d.* for every pair, and the value to be recovered by action, &c.

By the *st. 3 Car. c. 1.* continued by the *st. 16 Car. 4.* if a butcher, or any for him, by his privity, kill or sell any victuals on the Lord's day, and be convicted in six months, on view of a justice of peace, by confession, or two witnesses before any justice of peace, by confession, or two witnesses before any justice of peace, he shall forfeit *6s. 8d.* for offence, to be levied by distress and sale, &c. or by information, bill, &c. in a court of record of a corporation, or in sessions, to the use of the poor.

[Selling meat on Sunday no offence at common law; therefore indictment must be *contra formam*, &c. *Rex v. Brotherton, P. 12 G. Str. 702.*]

By the *st. 3 Car. c. 1.* a carrier, waggoner, carman, or drover, or any for him, travelling with horse, waggon, cart, or cattle, on the Lord's day, shall forfeit *20s.*, to be levied *ut supra.*

So, by the *st. 29 Car. 2. 7.* a horse-courser.

(C) Dies Juridici.

(C 1.) What are.

(C 1.) *The terms.* **D**IES *juridici* are within the four terms only Hilary term.] *Co. L. 135. a.*

The terms were settled before the Conquest in the time of the Saxons. *Per Dod. 2 Rol. 443.* And

And comprehended all times of the year, except *Christmas, Lent, Whitsuntide*, and harvest. 2 *Rol.* 443.

Hilary term anciently began, as it seems, *oct. Epiphan.*, which was the feast of *St. Hilary*, viz. 13th *January*, and continued till *Septuagesima*, which was the third *Sunday* before *Lent*. *Dugd. Or.* 7. 90.

But afterwards the beginning was enlarged till *oct. Hil.* and the continuance till *Lent*. 2 *Rol.* 443.

And it was afterwards ascertained and confined to the four returns *oct. Hil. quinden. Hil. cras. Pur.* and *oct. Pur.* which was the 9th *Feb.* and the *quarto die post* was the 12th *Feb.* which is now the last day of the term. *Vide ft. 51 H. 3. Dies Communes in B. et in Dote.*

(C 2.) *Easter term.*] *Easter* term antiently began *oct. Pascha*, and ended the day before the vigil of the *Ascension*, as it seems. *Dugd. Or.* 7. 91.

But afterwards the beginning was deferred till *quinden. Pascha*, and the end till the *Monday* before *Whitsuntide*, so that five returns were contained in it. *Quind. pas. tres sept. Mens.* and 5 *sept. Pascha*, and *cras. Ascent.* 2 *Rol.* 443. *Vide the ft. 51 H. 3 Dies Communes.*

(C 3.) *Trinity term.*] *Trinity* term antiently began *cras Trin.*, or *oct. Pentecost*, and continued till the *gule* of *August*, containing six returns. *Cras. oct. quind. Trin. cras. oct. quind. Joh. Bapt.* 2 *Rol.* 443. *St. 51 H. 3. Dies Communes.*

But by the *ft. 32 H. 8. 21.* *Trinity* term shall have but four returns only, *cras. oct. quind. Trin. & tres sept. Trin.* and shall commence for ever on the *Monday* after *Trinity* for *essoins*, returns, *proferts*, &c. And full term shall begin on *Friday* next after *Corpus Christi*, as before it began on the *Wednesday*.

And if the feast of *St. John the Baptist* happens upon the *Friday*, yet the term now begins upon the same day, and it shall be *dies juridicus*. *R. 2 Cro. 16. 1 Rol. 29.*

(C 4.) *Michaelmas term.*] So, *Michaelmas* term began antiently *oct. Mich.*, and continued till *Advent*. 2 *Rol.* 443. *Dugd. Or.* 7. 91.

And contained eight returns *oct. quind. tres sept. mens. Mich. cras. Animar. cras. Oct.*, and *quind. Martini*. *St. 51 H. 3. Dies Communes.*

But by the *ft. 16 Car. 1. 6.* *Michaelmas* term shall be restrained to the six last returns only, and shall commence on the *quarto die post tres sept. Mich.*, unless it be *Sunday*, and then on the morrow.

[By *stat. 24 G. 2. c. 48.* it contains only four returns, *cras. Om. Anim. cras. Mart. oct. S. Mart.* and *quind. S. Mart.* and begins on the fourth day of the morrow of *All-Souls* (6 *November*).]

[In the eye of the law the *essoign* day is for many purposes the first day of the term; the *quarto die post* is only an indulgence. 3 *T. R.* 185.]

How the term may be adjourned by writ of adjournment, and the effect of it, *vide Adjournment*, (A 1, &c.)

(C 5.) *Dies non Juridici.*

But by the law of the church and the laws of *Edward* the elder, *Knute*, *Edward* the Confessor, and *H. 1. judicia et juramenta* were prohibited (whereby all proceedings in law are comprehended) *ab adventu Domini usque oct. Epiph.*, a *Septuagesimā ad oct.* or *quind. Pascha*,
ab

ab Ascensione Domini ad oct. Pentecost. Dugd. Or. f. 89. Wilk. L. Angl. Sax. 197.

And by the laws of Edward the Confessor, the prohibition was extended *diebus 4 temporum, omnibus Sabbathis ab hora tertia post meridiem tota die sequente usque diem Luna, vigiliis S. Mar., S. Mich., S. Joh. Bapt., Apostolor. omnium et Sanctor. Dugd. Or. f. 90. Wilk. L. Angl. Sax. 197.*

And by the canon law, from Advent to the Utas Epiphan., a Septuagesima ad Utas Pasche, in the days of the four times of the great letanies, of the rogations, the week of Pentecost, the time of cutting corn or vintage, which lasts from St. Margaret (which was 13th July) till quind. Mich. 2 Inst. 264.

And therefore now Dies Dominicus, tho' it be in term, is not dies juridicus. Co. L. 135. a.

Nor, in Hilary term, the day of the Purification of the Blessed Virgin Mary, in Easter term, the feast of the Ascension, in Trinity term, the feast of St. John the Baptist, except when it falls on the first day of the term, in Michaelmas term, All Saints and All Souls. [Since the st. 24 Geo. 2. 48. these days are not within Michaelmas term.] Co. L. 135. a. 2 Cro. 16. 2 Inst. 265.

[On 29th May, restoration-day, only one judge comes down, and business is not usually done; but it may, and it being the last common paper-day in P. 7 G. 3. the one judge went thro' the paper, or the parties could not have had their judgment that term. 4 B. M. 2089.]

[The 29th May is not a holiday in any of the law-offices, and consequently no officer can take an extraordinary fee for business done on that day. Pater v. Croome, B. R. T. 37 Geo. 3. 7 T. R. 336.]

[St. Barnabas' day no holiday at the seal-office. Sparrow v. Cooper, C. P. T. 19 Geo. 3. 2 Bl. Rep. 1314.]

[The only allowed holidays are Candlemas, The Ascension, and St. John the Baptist. Ibid. Vide Figgins v. Willie, C. P. E. 18 G. 1186.]

But the Chancery is always open.

So, the Exchequer may sit upon a Sunday, or out of term. Mad. 551.

(C 6.) What Things are lawful upon them.

Yet by the st. W. 1. 51. it is enacted, that assizes of novel disseisin, mortd'ancestor, and darrein presentment, shall be taken in Advent, Septuagesima, or Lent, as other inquest.

So, where by custom the court of a lord is to be held every Monday, if it falls upon Christmas, or New Year's day, which are not juridici, yet the court may then adjourn.

So, if the county court happens upon such a feast, they may elect knights for parliament.

But an award of judicial process, or entry of a judgment upon such a day, is void. Jon. 156. Vide ante, (B 3.)

[Bail above may be put in. Baddely v. Adams, B. R. H. 33 Geo. 3. 5 T. R. 170.]

(C 7.) The Term is only one Day.

(C 7.) In what respects.] The term, regularly, is esteemed as one day; and therefore if a deed be alleged to be inrolled in such a term, it shall be intended the first day. R. 4 Co. 71. a.

If judgment be given in full term, it relates to the first day of the term. *R. 1 Bul. 35.*

And the first day is the *effoine-day*, for the *quarto die post* is a day of grace. *R. 1 Bul. 35.*

And therefore, inspection of an infant may be upon the *effoine-day*, and judgment upon it. *R. 1 Bul. 35.*

So, a judgment relates to the first day, tho' a day be assigned for argument at a day subsequent. *R. 1 Bul. 69.*

(C 8.) *In what not.*] But where the day is material, it may be alleged that the thing was done such a day in the term. *4 Co. 71.*

As, if there be an award 20th *May*, that all proceedings in an action shall cease; it may be alleged, that the party afterwards proceeded and had judgment, tho' the judgment relates to the first day of the term, which was before the award made. *Per Poph. Tel. 35.*

So, the *quarto die post* is the full term, and the day for appearance of the parties. *1 Bul. 35.*

And there shall be no judgment against a defendant upon his default till the *quarto die post*. *R. 1 Bul. 35.*

So, proclamations upon a fine must be in full term; for the pleas are to cease. *1 Bul. 34.*

[If money is paid between the first day of term, and the day on which a *latitat* is sued out, plaintiff shall enter a special memorandum, and it shall be as of the day of the return of the writ. *Southouse v. Allen, T. 8 G. 2. B. R. H. 141.*]

[Plaintiff may shew the true commencement of an action, contrary to the fiction of law, even in penal actions. *Morris v. Pugh, M. 2 G. 3. 3 B. M. 1241.*]

[If there is no special memorandum, he may shew by the writ that the action was commenced after the time to which the bill relates. *Ibid.*]

(D) Reasonable Time.

WHAT shall be reasonable time, the justices are to determine.

(E) When Night is unseasonable.

SUMMONS in a real action ought not to be after the setting of the sun. *R. Cro. El. 42.*

Nor, a demand of rent.

(F) When not.

BUT an arbitrament made in the night is good. *R. Cro. El. 42.*

So, livery of seisin upon a feoffment. *Cro. El. 43.*

(G) Time of Limitation.

(G 1.) In Actions Real.

[[G 1.) *When re-* THE statutes of limitations are a very beneficial system of laws, and of the greatest importance, inasmuch as they are statutes of repose. By Lord Kenyon Ch. J. *Doe v. Jones, B. R. T. 31 Geo. 3. 4 T. R. 308.*]

The time to make title to an inheritance is *de tempore cuius contrar: memorium hominum non existit*, of which, *vide in Prescription*, (A—E 1.) or a time limited for such particular actions. *Co. L. 115. a.*

Before the *ft. of Merton*, in a writ of right, it was *a tempore regis Henrici senioris*, viz. the beginning of the reign of *H. 1.* which began 1 August 1100. 2 *Inst. 94.*

By the *ft. of Mert.* 20 *H. 3. 8.* a writ of right is limited *a tempore regis H. avi nostri*, viz. the coronation of *H. 2.* which was 20 October 1154. 2 *Inst. 94.*

By the *ft. W. 1. 3 Ed. 139.* in a writ of right none shall count of the seisin of his ancestor of a longer seisin than of the time of king *Richard*, uncle of king *Henry*, father of the king that now is, viz. the reign of *R. 1.* which began 7 July 1189. 2 *Inst. 238.*

The limitation *a tempore R. 1.* imports the first day of his reign. *Co. L. 115. a. [2 Inst. 94. 238. 3 T. R. 41.]*

And now, by the *ft. 32 H. 8. 2.* no person shall maintain any writ of right, or make any prescription, title, or claim to any manors, lands, tenements, rents, annuities, commons, &c. or other hereditaments of the possession or seisin of any, his ancestor or predecessor, or allege any further seisin or possession of such ancestor or predecessor, than within sixty years before the *teste* of the same writ, or before the said prescription or title made.

And if any sue such action, and cannot prove his ancestor or predecessor in seisin, or actual possession within the years before limited, if the same be traversed or denied, &c. he and his heirs shall be barred for ever.

And therefore in all actions, which are of the nature of a writ of right, in which the plaintiff or demandant must count of a seisin, and recover any hereditament, he shall be barred, if his ancestor had not seisin within sixty years. (*Vide Bro. upon the St. Lim. 16, &c.*)

As, in a *nativo habendo*; for it is a writ of right in its nature, in which the villein shall be recovered. *Bro. upon St. Lim. 17.*

In a writ of customs and services, for the seigniorship shall be recovered. *Bro. upon the St. Lim. 16.*

A quod permittat for estovers. *Bro. St. Lim. 23, 24.*

So, if there be a plaint in a court-baron, &c. and the plaintiff makes protestation to sue in the nature of a writ of right, he shall be barred, if there was not a seisin within sixty years. *Bro. St. Lim. 21.*

So, if there be an action in a court of *antient demesne* upon a writ of right close. *Bro. St. Lim. 22.*

So, if a bishop or other sole corporation sue upon a seisin of his predecessor, he shall be barred; if the seisin was not within sixty years. *Bro. St. Lim. 33.*

So, if a man claims a thing by prescription, he must allege seisin of the same thing, where a seisin is necessary, within the time of limitation. *Bro. St. Lim. 34, 35.*

So, where *esplees* or seisin ought to be alleged, the count ought to allege them within time of limitation. *Bro. St. Lim. 13.*

And therefore, if they are alleged in the time of the king then dead, and part of his reign extend beyond the time of limitation, it ought to allege seisin such a year of such a king. *Bro. St. Lim. 13, 14.*

And seisin in law is sufficient without actual seisin. *R. 4 Co. 10.*

(G 2.) *When to fifty years.*] By the *st. Mert.* 20 *H.* 3. 8. *brevia mortis antecessoris, de nativis, et de ingressu non excedant ultimum redditum domini regis Johannis de Hibernia in Angliam, viz. the twelfth year of K. John.* 2 *Inst.* 94.

And by the same *stat. brevia nove disseisine non excedant primam transfretationem domini regis nunc in Gasconiam, viz. 5 H.* 3. 2 *Inst.* 95.

By the *st. W.* 1. 39. writs of *mortd'ancestor, cosinage, aiel, entry and nativis*, have term from the coronation of the same king Henry and not before, *viz. 28 Oct.* 1 *H.* 3. 2 *Inst.* 95. 238. Writs of *novel disseisin* and *nuper obiit* have from the first passage of king Henry, *viz. 5 H.* 3. 2 *Inst.* 95. 238.

But now, by the *st.* 32 *H.* 8. 2. no person shall maintain assise of *mortd'ancestor, cosinage, aiel*, writ of entry *sur disseisin*, or other possessory action of the possession of any of his ancestors or predecessors, for any manors, lands, &c. of any further seisin, but within fifty years next before the *teste* of the original.

And by the same *stat. scire facias* on fines shall be sued in fifty years after cause of action fallen, and not after.

(G 3.) *When to forty years.*] So, by the *st.* 32 *H.* 8. 2. no person shall make any avowry or cognizance for any rent, suit, or service, or allege any seisin or possession thereof in any ancestor, himself, or any other, above forty years next before such avowry or cognizance.

And therefore, in an avowry and cognizance for rent-service, or seck, seisin must be alleged within forty years. (*Vide Bro. St. Lim.* 63, &c.)

And if seisin be alleged within time, the defendant may plead, that he was never seised within forty years.

And it will be a good plea, tho' the tenant make a feoffment at this day to hold by the same services whereby he himself holds; for it is not a rent created *de novo* in certain, but refers to the antient rent. *Cro. Car.* 215.

So, if a rent-service be saved by an act of parliament, the *stat.* of limitations will be a good plea; for it is not a rent created by the statute. *Cont. per three J. but two J. acc. and it was R. in B. R. upon error.* *Cro. Car.* 81. 214. *Jon.* 233.

But in an avowry for rent, the avowant need not allege seisin within the time limited by the statute, where seisin need not have been alleged before; for it shall come by plea from the other party, if he was not seised. *Mo.* 31.

(G 4.) *When to thirty years.*] So, by the *st.* 32 *H.* 8. 2. no person shall maintain any action upon his own seisin or possession above thirty years before the *teste* of the original.

And therefore shall not maintain admeasurement of dower of his own endowment; for he recovers the land. *Bro. St. Lim.* 15.

(G 5.) *When to twenty years.*] So, by the *st.* 32 *H.* 8. 2. all *formedons in reverter, or remainder*, shall be sued in fifty years after title or cause of action fallen, and not after.

And by the *st.* 21 *Jac.* 16. all *formedons in descender, remainder, or reverter*, shall be sued in twenty years after title or cause of action first fallen, and at no time after.

And therefore, a *formedon in descender* must be sued within twenty years after the cause of action fallen. Tho'

Tho' it was not within the *st.* 32 *H.* 8. 2. 4 *Co.* 11. a. *Dy.* 278. a.

So, by the *st.* 21 *Jac.* 16. no person shall make entry into any lands, &c. but in twenty years next after his title of entry, which shall first accrue, to the same; and in default thereof such person so not entering, and his heirs, shall be disabled utterly from such entry.

And therefore, tho' since the *st.* 32 *H.* 8. 2. a man might have entred after sixty years, if his entry was *congeable*, and afterwards have maintained any possessory action. *R.* 4 *Co.* 12. a.

Yet he is at this day debarred of his entry, if it be not made within twenty years.

[In ejectment for mines, plaintiff proving himself lord of the manor, and in possession of it, does not avoid the statute of limitations, if defendant has been in possession of the mines twenty years; for they are distinct possessions, and may be different inheritances, *Rich v. Johnson*, *M.* 14 *Geo.* 2. *Str.* 1142.]

And by the *st.* 4 *Ann.* 16. no entry or claim shall be sufficient, unless an action be prosecuted within a year after.

And the entry or claim must be made upon the land, unless it be prevented by a special cause. *R.* 1 *Sal.* 285. *Mod. Ca.* 44.

So, a joint-tenant is not barred by non-entry in twenty years, if his companion was in possession. *R.* *Mod. Ca.* 44.

Nor, one parcener, who has the whole by devise, where the other parcener takes the profits. *H.* 1 *Ann.* inter *Reading and Roiffon*, *Sal.* 423.

So, by the *st.* 10 & 11 *W.* 3. 14. no fine, common recovery, or judgment in action real or personal, shall be reversed for any error or defect, unless error be commenced and prosecuted with effect within twenty years after such fine levied, recovery suffered, or judgment signed or entred on record.

[A reversioner cannot have error after twenty years, tho' his title did not accrue till after the expiration of them, and tho' error is brought in less than twenty years after the commencement of his title. *Lloyd v. Vaughan*, *T.* 19 *G.* 2. *Str.* 1257.]

[Copyholds are within the statute of limitations. *Moor*, 410. 3 *T. R.* 162.]

[To make length of possession a bar under these statutes, it must be a possession adverse to the title of the true owner, and not length of possession during a particular estate. *Cowp.* 218.]

(G 6.) In Actions Personal.

(G 6.) *When to six years.*] So, by the *st.* 21 *Jac.* 16. all actions of trespass, detinue, trover, and replevin for goods and chattels, account, and upon the case, (other than such accounts as concern trade of merchandise between merchant and merchant, their factors and servants,) all actions of debt without specialty, or for rent, (other than trespass for assault, menace, battery, wounding, or imprisonment, and actions on the case for slander,) shall be brought in six years next after the cause of such actions, and not after. *Vide Action upon the Case upon Assumpsit*, (D—H 6, 7.)

And therefore an action upon the case for trover must be brought within six years. *R.* 3 *Cro.* 246. 333.

So, debt for *damage clere*; for it is not founded upon a record. *R. Ray. 243.*

So, account, after an account stated between merchants. *Semb. Jon. 401.*

[The exception as to merchants' accounts, is only meant to prevent dividing a running account, but extends not to accounts closed and concluded. *Welford v. Liddel, T. 1751, 2 Vesey, 400.*]

So, an account by an *inland* merchant against his factor; for the exception in the statute does not extend to *inland* merchants. *R. Ca. Ch. 152.*

So, *assumpsit* or any action, except account, tho' it be for a merchant's account. *R. 2 Mod. 312. 1 Mod. 70.*

So, *in simul computasset*, or *indebitatus assumpsit*, upon an account stated. *R. per three J. 1 Lev. 287. 298. 2 Sand. 127. R. 4 Mod. 105. 2 Mod. 311.*

So, *assumpsit* by an attorney for fees. *R. 3 Lev. 367. D. cont. 2 Mod. 213. R. acc. Carth. 144.*

So, action upon the case for an escape, but not debt. *1 Sid. 306.*

So, *assumpsit* upon a bill of exchange, tho' it be between merchants; for it is *tantamount* to an account stated. *R. 4 Mod. 105. Sho. 341.*

So, the statute of limitations will be a bar, tho' part of the time elapsed during the rebellion, when there was an interruption of justice. *R. 1 Lev. 31. 111. Sal. 420.*

Tho' the defendant had privilege of parliament. *R. 1 Lev. 111. Sho. 99.*

Or, was out of the kingdom. *R. Sal. 420. R. Sho. 99. 2 Ver. 541. Hard. 502. But vide post. (G 16.)*

Tho' the plaintiff had obtained judgment or sentence for it in *France*, or another kingdom; for here it is to be considered only as a debt upon simple contract. *R. 2 Ver. 540.*

So, by the *st. 3 & 4 Ann. 9.* actions on promissory notes shall be brought within the time appointed for actions upon the case by the *st. 21 Jac. 16.*

So, by the *st. 4 Ann. 16.* all suits in the Admiralty for seamen's wages shall be commenced in six years after the cause of action.

So, they ought to have been before. *Semb. Mod. Ca. 26. Sal. 424. Hard. 502.*

But the cause of action arises by the service, not by the contract. *Mod. Ca. 26.*

So, where the cause of action commences by a request, or upon any other condition precedent, the statute cannot be pleaded, if the action be commenced within six years after the request, &c. tho' it be ten years after the promise or contract. *R. Godb. 437. Jon. 194. 329.*

So, if an account be delivered between merchants, and one of them acknowledges so much due, the other insists upon more, it is not an account stated. *R. Jon. 401.*

So, the statute of limitations does not extend to suits in the Admiralty or spiritual court.

[It is not sufficient that the writ bears *teste* before the expiration of the six years, it must be really and in fact taken out, for that is the commence-

commencement of the suit. And the true time may be averred and shewn notwithstanding the *teste*. *Johnson v. Smith*, P. 33 G. 2. 2 B. M. 950.]

[Acknowledgment of the debt, after action brought, takes it out of the statute. *Yea v. Fouraker*, M. 1 G. 3. 2 B. M. 1099.]

[The statute doth not begin to run against a foreigner till he comes into England. *Strithorst v. Grame*, M. 11 G. 3. 3 Wils. 145. *Vide supra*, *Action upon the Case upon Assumpsit*, (H 6.)]

(G 7.) *When to four years.*] So, by the *st.* 21 *Jac.* 16. all actions of trespass for assault, battery, wounding, or imprisonment, shall be brought within four years next after the cause of action.

If trespass or imprisonment be alleged, 32 *Car.* 2. *usque* 1 *Jac.* 2. the defendant may plead, as to all the trespass or imprisonment, till 34 *Car.* 2. the statute of limitations, and another plea to the residue of the time. R. *Sal.* 420.

(G 8.) *When to two years.*] So, by the *st.* 21 *Jac.* 16. actions upon the case for words shall be within two years next after the words spoken.

And if the words are actionable without a special damage, the statute of limitations will be a bar. R. *Ray.* 61. 1 *Sid.* 95.

So, an action *quia crimen felon. imposuit*. *Ray.* 61. 1 *Sid.* 95. if it be not within six years. *Vide infra*.

But an action for slander of a title is not within the *st.* 21 *Jac.* R. *Cro. Car.* 141.

Nor, an action for words founded upon an indictment, or other record. 1 *Sid.* 95.

Nor, an action *quia crimen felon. imposuit*. 1 *Sid.* 95. *Vide supra*.

[An action cannot be maintained against officers of the customs, for seizing goods as forfeited by the revenue laws, unless it be brought within three months after the actual seizure; tho' a suit be instituted in the court of *Exchequer* for the condemnation of the goods, which is depending at the expiration of the three months. *Godin v. Ferris*, C. P. M. 32 *Geo.* 3. 2 *H. Bl.* 14.]

[Where an action must be brought within three months, it is sufficient for the plaintiff to prove a writ sued out within such time, and his declaration within a year afterwards, without shewing such writ returned. *Parsons v. King*, B. R. M. 37 *Geo.* 3. 7 *T. R.* 6.]

(G 9.) What Cases are not within the Statutes of Limitations.

(G 9.) *Such as may not fall within the time limited.*] But the *stat.* 32 *H.* 8. 2. does not extend to cases where the seisin is casual, and by possibility does not fall within sixty years; as it does not extend to the services of homage or fealty. R. 4 *Co.* 10. b. *Co. L.* 115. a. 2 *Inst.* 96. R. 3 *Lev.* 21.

Nor, to the service of covering the hall of the lord, or going with him to war. 4 *Co.* 10. b.

Nor, to a writ of right of dower; for the plaintiff does not count of her possession, nor of the seisin of any ancestor, and therefore it is out of the statute. *Bro. St. Lim.* 23.

So, for the same reason, it was enacted by the *st.* 1 *Mar.* 5. that 32 *H.* 8. shall not extend to a writ of right of advowson, *quare impedit*,

pedit, darrein presentment, jure patronatus, writ of right of ward, ravishment of ward of body or lands holden by knight's service.

But seisin of homage must be alleged within the *st. de Mert.* 8. or *W.* 1. 39. 2 *Inst.* 96.

And seisin in law is sufficient since the *st.* 32 *H.* 8. 2. *R.* 4 *Co.* 10. 2 *Inst.* 96. *Vide Seisin* (E).

(G 10.) *In which seisin is not traversable.*] So, the *st.* 32 *H.* 8. does not extend to actions, in which seisin need not be alleged; as, waste; for the land is not directly in demand, and the plaintiff does not declare of any seisin in it. *Bro. St. Lim.* 20, 21.

Annuity; for the plaintiff does not declare upon a seisin, but upon his grant. *Bro. St. Lim.* 26.

Nor, where seisin, tho' it be alleged, is not traversable; as, in escheat, for the seisin is not traversable, but the tenure. 4 *Co.* 11. a.

In a *cessavit*, or writ of *rescous*. 4 *Co.* 11. a. *Mo.* 44.

(G 11.) *Actions for discharge, &c.*] So, the *st.* 32 *H.* 8. 2. does not extend to actions which go in discharge only, and not to recover any thing; as, in a *contra formam feoffamenti*; for the plaintiff only discharges himself. *Bro. St. Lim.* 15.

A *monstraverunt* by tenants in *antient demesne*. *Bro. upon St. Lim.* 17.

A *ne injuste vexes* upon an encroachment of services by the lord. *Bro. upon St. Lim.* 18.

A writ of *mesne* upon a deed of acquittal. *Bro. St. Lim.* 18.

A *quo jure*. *Bro. St. Lim.* 19.

A *warrantia charta*. *Ibid.*

Nor, to error upon a judgment, &c. till the *st.* 10 & 11 *W.* 3. *Bro. upon St. Lim.* 16. *Vide ante*, (G 5.)

Nor, to a writ of false judgment. *Bro. upon St. Lim.* 16.

Nor, to actions for contribution; as, a *contributions facienda*; for he recovers only damages for part of the charge of a suit. *Bro. upon St. Lim.* 15.

Nor, to an assise of nuisance; for nothing shall be recovered, but the nuisance removed. *Bro. upon St. Lim.* 20.

Nor, to a *quid juris clamat*, or *per quæ servitia*; for nothing shall be demanded but attornment. *Bro. St. Lim.* 20.

A writ of right of disclaimer. *Bro. St. Lim.* 23.

Nor, to a *scire facias* to execute a judgment; for the 32 *H.* 8. mentions only *scire facias* upon a fine.

Nor, to an attainit.

So, the *st.* 32 *H.* 8. 2. does not extend to proceedings without any writ; as, to a plaint in the courts of *Wales*, *Cinque Ports*, or other court. *Bro. St. Lim.* 21. *Vide ante*, (G 1.)

So, it does not extend to a corporation aggregate; as, mayor and commonalty; for they do not count upon a seisin of any ancestor or predecessor, but upon their own possession. *Bro. St. Lim.* 33.

On a dean and chapter. *Ibid.*

Otherwise a corporation sole. *Vide ante*, (G 1.)

So, it does not extend to the king; for he is not bound by the statute. *Bro. St. Lim.* 67. *Dub. Stamf. Præ. R.* 42. b.

Nor, to an avowry or cognizance; as, bailiff to the king. *Bro. St. Lim.* 67.

So,

So, if a man can make title to possession within the time of limitation, he may maintain it by a title before the time of limitation; as, in an assise, if the plaintiff makes title at large by escheat forty years past, upon which he entred and was seised, till a disseisin by the defendant within thirty years. *Bro. St. Lim. 26.*

(G 12.) *Prescription in discharge.*] So, if a man claims by prescription a thing which goes in discharge only, it is sufficient to allege the usage *de tempore R. 1.* without alleging within sixty years; as, if he prescribes to oust from his common cattle that were not *levant and couchant.* *Bro. St. Lim. 136.*

To be discharged of toll. *Bro. St. Lim. 39.*

To drive cattle to a pound through the soil of another, without making amends for the escape. *Bro. St. Lim. 41.*

So, if he claims only an easement; as, liberty to enter his land to repair a gutter. *Bro. St. Lim. 37.*

To stop an aquæduct during the repair of a mill. *Bro. St. Lim. 41, 42.*

To have a way in the soil of another to church. *Bro. St. Lim. 42.*

(G 13.) *Or, by que estate.*] So, if a man prescribes by a *que estate*, and not in him and his ancestors, it is sufficient to allege *de tempore R. 1.* without saying within sixty years; as, if he prescribes by a *que estate* to suit to his mill. *Bro. St. Lim. 40.*

So, if a corporation prescribes to be a corporation *de tempore R. 1.* it is well. *Bro. St. Lim. 43.*

So, if a woman prescribes to have dower, tho' her husband was attainted of felony. *Bro. St. Lim. 45.*

(G 14.) *Avowry, &c. not for rent or suit.*] So, an avowry need not allege seisin within forty years, unless it be for rent, suit, or service; and therefore, if a man avows for toll due fifty years past, it is well. *Bro. St. Lim. 64.*

Or, for an amerciamen in a leet. *Bro. St. Lim. 67.*

Or, for a *nomine pœne.* *Ibid.*

Aid to make his son a knight, or to marry his daughter. *Bro. St. Lim. 72, 73.*

Or, for relief. *2 Inst. 95.*

So, for the fees of a knight or burghers of parliament. *Bro. St. Lim. 73.*

But in an avowry or cognizance for relief, &c. where the seisin is traversable, the party must allege seisin within the time limited by the *st. de Mert. 8. viz. post Transfretationem, H. 3. in Gasconiam. 2 Inst. 96.*

So, it does not extend to a suit or service, which by possibility will not fall within the time of limitation. *Vide ante, (G 9.)*

Nor, to a justification in *replevin*, for the statute mentions avowry and cognizance only. *Bro. St. Lim. 67, 68.*

(G 15.) *Actions upon specialty, &c.*] So, the *st. 32 H. 8. 2.* does not extend to actions founded upon a deed or specialty; and therefore, if an avowry be for rent created by deed, it is not within the statute of limitations. *Co. L. 115. a. 2 Ver. 235.*

[But twenty years without any demand is of itself a presumption that a bond has been paid. *1 T. R. 270.*] [So,

[So, where twenty years quiet and uninterrupted possession of ancient lights was deemed a sufficient ground, from which the jury might presume a grant. 3 T. R. 159.]

As, for a rent-charge.

So, if the lord confirms the estate of his tenant, to hold by 10s. where he held before by 20s. in avowry for the 10s. Cro. Car. 82.

So, if there be an avowry for rent upon a reservation; for the reservation will be the title. Co. L. 115. a.

So, if a rent be originally created by act of parliament. Cro. Car. 81.

So, by the *st.* 21 Jac. 16. debt limited to six years after the cause of action is, when it is not founded upon a specialty; and therefore, debt for rent, reserved by indenture, is not within any statute of limitations; for it is founded upon a specialty. R. Hutt. 109.

Nor, debt upon the *st.* 2 & 3 Ed. 6. 13. for not setting out tythes; for the statute is a specialty. R. Cro. Car. 513.

Nor, debt for an escape; for it is founded upon the *st.* 1 R. 2. 12. before which an action upon the case only lay. R. 1 Sand. 38. R. 1 Lev. 191. 1 Sid. 306.

Nor, debt upon an award. Semb. 1 Lev. 273. 1 Sid. 415. 2 Sand. 63.

Nor, debt for a copyhold fine; for it is not founded upon a contract or lending. 1 Lev. 273.

Nor, an action by an assignee of commissioners of bankrupts. 2 Lev. 166.

Nor, debt upon a tally. Per Windh. 1 Sid. 306.

Nor, an action against a sheriff for money levied upon a *fieri facias*. R. 3 Mod. 312.

Nor, a suit for a legacy. Mod. Ca. 25.

So, the *st.* 21 Jac. 16. does not extend to accounts current between merchant and merchant. 1 Lev. 287. 3 Mod. 312.

Nor, to a bargain between merchants, when there is no stated account. Semb. 1 Vent. 90. 1 Sid. 465.

Nor, to a suit in equity by bill for an account of money received upon a trust. R. Ca. Ch. 26. R. 2 Vent. 345. D. Mod. Ca. 25. Eq. Abr. 303.

Nor, to a *rationali parte bonorum*, tho' it sounds in *detinue*. R. Lit. 342. D. Mod. Ca. 26. R. Hut. 109.

Nor, to a suit for a charity. Eq. Abr. 304.

So, the statute does not extend, where the action is commenced in an inferior court within time, tho' it be afterwards removed by *habeas corpus*, and there commenced *de novo*. R. 1 Sid. 228. Vide post. (G 17.)

Nor, where the action is commenced within time in B. R. and afterwards there is a bill in equity for the same demand. 2 Ver. 695.

The *st.* 21 Jac. 16. does not extend to an action for words in slander of a title. D. Ray. 61. Vide ante, (G 8.)

Nor, to an action for words which are not actionable without special damage, if the damage, upon which the words become actionable, happened within two years. R. 1 Sid. 95. Per Twissd. 1 Sid. 85. Ray. 61. Cro. Car. 141.

Nor, to *scandalum magnatum*. Lit. 342. 1 Sid. 415.

Nor, to an action for words founded upon an indictment, or other matter of record. 1 Sid. 95.

Nor, to an action commenced in due time, but not revived, because
no

no person proved the will of the defendant, or took out administration to him. 2 Ver. 695.

(G 16.) *Action by an infant, &c.*] So, by the *st.* 21 Jac. 16. no person entitled to a *formedon* or right of entry, who, at the time of such right of action or entry first fallen, was an infant, *feme-covert*, *non compos*, in prison, or beyond the seas, shall be barred of such action or entry, tho' the twenty years be expired; so as he or his heirs, within ten years after his being of full age, discover, of sound mind, enlargement out of prison, return into the realm, or death, take the benefit of or sue forth the same, and not after ten years.

So, by the same statute, no person entitled to trespass, *detinue*, *trover*, *replevin*, account, debt, trespass for assault, menace, battery, wounding, or imprisonment, or action on the case for words, shall be disabled from such actions, by being at the time of such cause of action accrued under age, *covert*, *non compos*, in prison, or beyond seas, so as they take the same within the times by the said statute limited after coming of age, being discover, of sane memory, at large, or returned from beyond sea.

Nor, by the *st.* 4 Ann. 16. any person entitled to suit for seamen's wages, &c.

And if the plaintiff was in Ireland, that shall be *ultra mare* within this statute. *Per Holt, Sho.* 91.

So, all actions upon the case are within the benefit of this proviso. *R.* 1 Sid. 453. 2 Sand. 120. *R.* 2 Mod. 72.

Assumpsit, tho' it be not named. *F. g.* 81.

So, by the *st.* 4 Ann. 16. if any person against whom an action lies for seamen's wages, trespass, *detinue*, *trover*, &c. (or other actions mentioned 21 Jac. 16.) was beyond sea at the time of such action accrued, the plaintiff shall be at liberty to bring his action against him within the same time after his return as was limited for such action by the said *st.* 21 Jac. 16. and 4 Ann. 16.

So, it was before. *R.* 1 Lev. 143. *Dub.* 3 Mod. 312. *R. cont.* *Sho.* 99. *Acc. Mod. Ca.* 26. *R. acc. per two J.* *Cro. Car.* 246. 334. *Richardson dub.* & *Cro. cont.* *Semb. cont.* 2 Ver. 694.

[If plaintiff is in England when cause of action accrues, the time of limitation begins to run, tho' he afterwards goes abroad. *Smith v. Hill*, T. 19 & 20 G. 2. *Wilf.* 134.]

(G 17.) *Or, brought within a year after judgment or outlawry reversed.*] So, by the *st.* 21 Jac. 16. if judgment for plaintiff be reversed, or arrested after verdict, or defendant be outlawed, and the outlawry afterwards reversed, the plaintiff, his heirs, executors, or administrators, may commence a new action within a year after judgment or outlawry reversed, and not after.

So, if an action was commenced within six years, and the plaintiff dies, his executor or administrator may commence a new action, tho' six years are past, and shew the special matter. *Sal.* 425. *F. g.* 171.

So, if an action in an inferior court within six years be removed by *habeas corpus*, and the plaintiff there declares *de novo* after six years. *R. Sal.* 424.

Yet the new action by the executor or administrator ought to be recent, and the space of a year limited upon a reversal or arrest of judgment

judgment seems a reasonable time; and if the grant of a probate or administration be delayed, it must be shewn. *R. F. g. 170. 289.*

(G 18.) *Or, where promise or provision is made for payment.*] So, if a man after six years acknowledge the debt due, and promises payment, it will be out of the statute of limitations. *Pr. Ch. 386.*

So, if by his will he directs all his debts to be paid. *Pr. Ch. 385.*

Or, makes a provision for payment of his debts generally. Ibid.

Or, publishes an advertisement in the Gazette, or other newspaper, that all debts owing by him, upon application at such a place, or to such a person, shall be paid. R. Pr. Ch. 385.

(G 19.) Pleading the Statute of Limitations, and the Effect of the Statute.

So, a man barred of an action by the statute of limitations must plead it, otherwise it shall not be intended. *Cont. Cro. Car. 114. R. acc. Cro. Car. 141. 160.*

So, if a verdict finds the action brought so many years after title accrued, it signifies nothing, if he does not find that ~~no~~ other action was brought. *Sal. 422.*

So, if a man be not ousted, or disseised, the statute of limitations does not take effect against him; as, if a stranger takes the profits with him, who has the right, for twenty years. *R. Sal. 423.*

So, if a man be barred of an action by the statute of limitations, he shall take advantage of a title of entry, which afterwards accrues. *R. Sal. 422.*

Or, if there be a contract for an annual payment, and the plaintiff sues for the arrears for twenty years, the statute of limitations cannot be pleaded to the whole. R. Al. 62.

If *A.* converts goods beyond sea, and after six years he returns, and upon demand refuses the delivery, it will be a new conversion. *Per three J. Cro. Car. 246. 334.*

So, a man shall not be restrained, in a court of equity, from pleading the statute of limitations to an action at law.

Tho' he exhibits a bill for relief in equity, but is dismissed, and the time incurs, pending his bill. *R. 1 Ch. R. 205. 214. Dub. 3 Ch. R. 97.*

[A bill depending in Chancery almost six years is not such a demand as to take a debt out of the statute of limitations. *Anon. H. 1736, 2 Atkyns, 1.*]

[The appointment of a receiver in Chancery will not prevent the statute of limitations running on. *Anon. H. 1737, 2 Atkyns, 15.*]

T E N A N C Y.

Entire Tenancy.

Vide Abatement, (F 13.)

General Tenancy.

Vide Abatement, (F 12.)

TENANT.

Tenant to the *Præcipe*.*Vide Recovery*, (B 3, 4.)

Tenant in Common.

Vide Abatement, (E 10.—F 6.)—*Chancery*, (3 V 4.)—*Devise*, (N 8.)—*Estates*, (K 8.)

— by Curtesy.

Vide Copyhold, (K 1.)—*Estates*, (D 1, 2.)—*Wast*, (F 2.)

— in Dower.

Vide Dower, (C 1, 2, &c.)—*Wast*, (F 2.)

— in Fee.

Vide Copyhold, (C 7.)—*Devise*, (N 4.)—*Estates*, (A 1, &c.)—*Officer*, (B 7.)

— in Tail.

Vide Chancery, (4 S 1, &c.)—*Copyhold*, (C 8, 9.)—*Devise*, (H 8.—N 5, 6.)—*Discontinuance*, (A 4.)—*Estates*, (B 1, &c. 7, 8. 22, &c. 33.)—*Officer*, (B 8.)

— after Possibility of Issue extinct.

Vide Estates, (C 1, &c.)

— for Life.

Vide Copyhold, (C 10.)—*Devise*, (N 7.)—*Estates*, (E 1, &c.)—*Officer*, (B 9.)—*Wast*, (F 2.)

— for Years.

Vide Estates, (G 1, &c.)—*Officer*, (B 12.)—*Wast*, (F 2.)

— at Will.

Vide Estates, (H 1, &c.)—*Officer*, (B 11.)

— by Sufferance.

Vide Estates, (I 1, 2.)

TENDER.

Vide Action upon the Case upon Assumpsit, (H 8.)—*Condition*, (L 4.)—*Pleader*, (2 G 2.—2 W 28. 49.—3 K 23.—3 M 36.)

TENEMENT.

Vide Grant, (E 2.)—*Trespass*, (A 2.)

TENET ET TENUIT.

Vide Pleader, (3 O 3.)

T E N T H S.

(A) Tenths.

THE tythe or tenth of the annual value of any benefice was granted to the pope, *circa* 20 *Ed.* 1. according to the value then taken of every benefice. 2 *Inst.* 628. 1 *Rol.* 473.

And this was in imitation of the Levitical law, whereby the Levites pay a tenth to the chief priest. 2 *Inst.* 628.

But it seems that tenths were received of the clergy by pope Gregory 9, *anno* 1229, 13 *H.* 3. *Forst.* 12.

And granted by the clergy to king R. 1. *anno* 1189. for his expedition against the *Turks.* *Sp. Gloss. Decima Salad.*

By the *st.* 26 *H.* 8. 3. the king shall receive, as united to the crown, a yearly pension amounting to a tenth of all profits of every archbishop, bishopric, abbey, &c. deanry, hospital, college, &c. parsonage, vicarage, &c. within this realm.

And a commission shall go into every diocese to inquire the true yearly value of all manors, lands, &c. belonging to any bishopric, &c. or other benefice or spiritual promotion; and, after certificate by any three of the commissioners of the value and tax set of the tenth, every archbishop and bishop shall be charged with levying the same within his diocese, and process shall go against the archbishop or bishop for the same; and the bishop may levy it by ecclesiastical censures, distress, &c. on any rated in his diocese, whereon no *replevin*, prohibition, *superfedeas* on excommunication, &c. may be allowed.

And the incumbent, on default after demand at his church by the bishop or his officers, and forty days neglect certified into the *Exchequer* under the seal of the archbishop, bishop, &c. shall be deprived *ipso facto*, by the *st.* 2 & 3 *Ed.* 6. 20. of such benefice only.

And by such certificate the archbishop or bishop shall be discharged for so much, and process shall go against the incumbent.

And by the *st.* 32 *H.* 8. 22. on the oath of an archbishop, &c. charged with collection of the tenth, that he cannot, for sufficient cause alleged, levy any part of the tenth charged, and no matter shewn to the contrary by the king's serjeant or attorney, the *Exchequer* may discharge the accountant upon such allegation, or may award a commission to inquire the truth, and on return, &c. discharge him.

But by the *st.* 27 *H.* 8. 8. every spiritual person, on his composition, &c. for his first-fruits, shall have a deduction of his tenth for that year out of his first-fruits; but shall answer the tenth to the king.

And if a successor be charged with any tenth, arrear at the death of his predecessor, he may distrain the goods of the predecessor, remaining on his benefice, and, on non-payment in twelve days after, cause them to be appraised by two or three sworn appraisers, and sold for satisfaction of the arrears and his costs; or may sue by bill in *Chancery*, or action of debt,

So,

So, before a certificate of non-payment of tenths, there ought to be an exprefs demand by a man authorized by the bishop; and therefore a demand by an apparitor is not sufficient. *R. Cro. El. 80. Mo. 915. R. Mo. 541.*

Or, sub-collector, &c. *R. Sav. 1.*

Nor, a demand to pay to another as his deputy. *Cro. El. 81. R. Sav. 1.*

Or, at any other place than his house or church. *Cro. El. 81. Mo. 915.*

Or, his stall in the choir, where the demand is made of a dignitary there. *Sav. 1.*

So, a certificate of non-payment is traversable, if there was not a due demand, &c. *Cro. El. 80. Mo. 915. R. Mo. 541.*

And if there be payment after demand, and before certificate, it will be void. *R. Sav. 26.*

(B) Annates.

THE annates or *primitiæ* were the value of every benefice for the first year, which was paid to the pope by all archbishops and bishops, and began *temp. Bonifacii 9. or Johannis 22. Cod. J. Eccl. 871. Spel. Gloss. Annates.*

By the *st. 6 H. 4. 1.* it was enacted, that any who paid to the chamber of *Rome* for first-fruits more than was accustomed, should forfeit, &c.

By the *st. 25 H. 8. 20.* no archbishop or bishop shall pay annates, or other pension, &c. to the see of *Rome*.

By the *st. 26 H. 8. 3.* (repealed by the *st. 2 & 3 Ph. & M. 4.* but revived by the *st. 1 El. 4.*) every archbishop, bishop, abbot, master of college, hospital, dean, prebend, parson, vicar, or other having any spiritual promotion, to whose gift soever belonging, before any possession, or meddling with the profits of the benefice, shall pay or compound to pay to the king's use, on good sureties, the first-fruits, or one year's profit of his benefice, &c.

And the chancellor, master of the *rolls*, or other, to be named by commission under the great seal, may examine the true value, &c. and compound or agree for a rate for the first-fruits.

An obligation for payment shall be of the same effect as a statute-staple; and if any enter into a benefice, &c. without paying or agreeing, &c. he shall be taken as an intruder, &c. and being convicted by verdict, confession, &c. before the lord chancellor or other commissioners, shall pay for every offence double the value of the first-fruits.

And all first-fruits payable to the bishop of *Norwich*, or any other but the king, shall cease.

By the *st. 28 H. 8. 11.* the year for which first-fruits are paid shall be computed from the avoidance of the benefice or spiritual promotion.

And by the *st. 6 Ann. 27.* bishops shall be allowed four years from the restitution of temporalities to pay the first-fruits, paying a fourth part of the composition each year; and if he, &c. be removed, shall be discharged of all not then payable.

By the *st. 2 & 3 Ann. 11.* the queen, by letters patent, may grant to the corporation, thereby to be erected, all the first-fruits and tenths, &c.
for

for the maintenance of parsons, vicars, and curates of the church of *England*.

And all former statutes for payment, levying, discharging, &c. shall be in force.

And one bond only shall be given for four payments of first-fruits, and no fifth bond.

And the said first-fruits and tenths shall be answered and paid according to such rates and proportions only as the same have been heretofore usually rated and paid.

The value of benefices was assessed 20 *Ed.* 1.

But the valuation, according to which the first-fruits and tenths are computed, was made 26 *H.* 8. pursuant to the above statute, and now remains in the *Exchequer*. 4 *Inst.* 120.

But by the *st.* 26 *H.* 8. 3. a parson or vicar, whose benefice exceeds not eight marks, shall not pay first-fruits, unless he lives three years therein.

Nor, by the *st.* 1 *El.* 4. vicarages of 10*l.* *per annum*, or parsonages of 10 marks *per annum*, or under. 4 *Inst.* 120.

Nor, by the *st.* 5 *Ann.* 24. benefices not exceeding 5*l.* *per annum* improved value, which have cure of souls. Conf. by the *st.* 6 *Ann.* 27.

So, by the *st.* 26 *H.* 8. 17. a lessee of manors, lands, &c. of a bishop, or other spiritual person, shall not be chargeable to the king, but his lessor shall be charged for first-fruits, notwithstanding any covenant, &c. to the contrary.

By the *st.* 27 *H.* 8. 8. commissioners authorized to compound for first-fruits, may deduct the tenth (which yet shall be paid the king).

The demand and collection of first-fruits and tenths by the pope was prohibited *temp.* *Ed.* 3. *R.* 2. & *H.* 4. 4 *Inst.* 120.

By the *st.* 32 *H.* 8. 45. the court of first-fruits and tenths was erected, but repealed by the *st.* 1 *Mar.* 10. and not revived by the *st.* 1 *El.* 4.

(C) Procurations.

PROcurations or proxies are paid by the clergy to the bishop or archdeacon in recompence of their visitation. *Dav.* 3. 6.

When the charge of the visitation became excessive, a sum was paid and accepted by antient composition in lieu of it. *Dav.* 3.

And therefore every benefice with cure is subject to procuration or proxy.

Tho' the composition does not appear; for it may be claimed by prescription or grant. *Hard.* 181.

But if there be a parsonage, and also a vicarage endowed, there shall be one procuration paid for both.

So, no procuration shall be paid for a donative; for it is exempt from the visitation of the ordinary.

Nor, for a chapel which depends upon a parsonage.

Proxies or procurations are collateral to the land, and not extinguished by unity of possession. *Hard.* 388.

If proxies or procurations are refused, remedy lies in the ecclesiastical court; for their jurisdiction is saved by the *st.* 34 & 35 *H.* 8. 19. *Hard.* 181. 388.

So, a bill in equity lies for the recovery. *Dub. Hard.* 181.

So,

So, there shall be a remedy at law; if due by grant or prescription.
Hard. 181.

(D) Pensions.

SO, upon resignation of a dignity or spiritual promotion, the person to whom the resignation is made, sometimes grants a pension to his predecessor. *Vide Prohibition, (G 11.)*

But by the *st. 26 H. 8. 3. f. 22.* a moiety of such pensions as exceeded 40*l.* was discharged, and the tenth of all other pensions.

And no such pension *in futuro* must exceed the third part of the value of the dignity or spiritual promotion.

T E N U R E.

(A) All Lands are held of the King.

BY what tenures lands are held, *vide in Homage.*
 To what services they are subject, *ibid.*

To whom the seigniorie belongs, and the incidents to it, *vide in Seigniorie (A).*

All lands and tenements in the hands of a subject are held immediately or mediately of the king. *Co. L. 1. a. Wri. Int. 138.*

And therefore, tho' the king releases to his tenant all services, yet he holds of him. *8 H. 7. 12. b. R. 9 Co. 123.*

So, if an office finds a dying seised, but of what tenure is ignorant, and thereupon a *melius inquirendum* finds in the same manner, that is sufficient to entitle the king; for it shall be supposed that the tenure is of him. *R. 2 Cro. 41.*

So, liberties and things in *gross* may be granted to be held of the king, tho' not of a subject. *Mo. 168.*

(B) But the King holds of no one.

BUT the king holds of no one. *Co. L. 1. b.*

If lands held of the king, or of any other, are forfeited to the king for treason, the tenure is extinct. *Bro. Parliament, 77. 6 Co. 5. b. 2 Rol. 514. l. 3.*

And tho' the king afterwards grants the lands to another, the tenure shall not be revived in the hands of the patentee without express words.

Tho' there be a saving of all rights, rents, services, &c.; for these words do not revive it. *Bro. Parl. 77.*

So, if the king purchases land of another, the tenure is extinct. *2 Rol. 513. B.*

Tho' the tenant enfeoffs the king, and retakes the estate from him. *2 Rol. 514. l. 1.*

So, if tenant *paravail* enfeoffs the king, the *mesnalty* is extinct; for the *mesnalty* and estate *paravail* are but one estate. *Dy. 154.*

So, if tenant *paravail* makes a gift in tail, remainder to the king. *R. Dy. 154. b. 2 Rol. 514. l. 5.*

So, tenure of chauntries and other lands given to the king, by the *fl. 1 Ed. 6. 14.*, &c. is extinct, tho' there be a saving for the rights of all strangers, &c. *R. Dy. 313. a. R. 1 And. 45.*

Yet the lord of chauntries, &c. given to the king, may avow upon the land for his rent, tho' not upon the person, as within his fee. *Dy. 313. a.*

So, if the king grants lands forfeited, &c. the tenure may be revived by proper words; as, if he grants *tenend. de capitali domino per servitia debita. R. 6 Co. 6. a. Bro. Tenure, 3.*

Feudum originally was a portion of land granted by a prince, &c. to his officers or soldiers, upon a compact, exprefs or implied, to render to his lord service and aid. *Wri. Intr. 7.*

And was revocable at will, afterwards granted for years, afterwards for life, and afterwards in perpetuity. *Wri. Intr. 14.*

Vide more concerning *Tenure in Dignity*, (C 2.)—*Justices of Peace*, (A 2.)—*War* (B 1.)

Tenure in Burgage.

Vide Burrough (E).

TERM OF YEARS.

Vide Estates, (G 1, &c.)—*Pleader*, (2 Y 16.)—*Receipt*, (A 1.)—*Recovery*, (B 8.)—*Remitter*, (C 7.)

— to attend Inheritance.

Vide Chancery, (4 G 5.)

Trust of a Term.

Vide Chancery, (4 W 19, &c.)

T E R M O R.

Vide Receipt, (A 1.—B 2.)—*Recovery*, (B 8.)

THE TERMS.

Vide Adjournment (A).—*Temps*, (C 1, &c.)

TERRE-TENANTS.

Vide Pleader, (3 L 14.)

T E S T A M E N T.

Vide Devise.

TESTAMENTARY MATTERS.

Vide Prohibition, (G 16.)

T E S T A T O R.

Vide Administration, (B 11.)—*Chancery*, (3 G 1.)—*Devise*, (N 21.)

TESTATUM CAPIAS, or FIERI FACIAS.

Vide Procefs, (E 7.)

TEST ACT.

Vide Officer, (K 7.)—Pleader, (2 S 28.)

TESTE OF A WRIT.

Vide Abatement, (H 14.)—Mandamus, (C 4.)

TESTMOIGNE.

(A) Witnefs; Who fhall not be.

(A 1.) *Non Compos.***E**VERY witnefs muft be credible.And therefore, a man of *non-fane* memory fhall not be allowed as a witnefs. *Co. L. 6. b.*

As, an idiot.

A lunatic, during his lunacy.

So, one within age of difcretion. *Co. L. 6. b.*

As, an infant, who does not know the nature of an oath.

[Infant under ten, very feldom, and under nine never, admitted to be a witnefs, either in capital cafes or leffer offences. *Rex v. Travers, per Gilbert C. B. and Raymond C. J. P. 12 Geo. Str. 700.*So, in an *atate probanda*, a witnefs fhall not be allowed under the age of 42 years. *Bro. Testm. 30.*But a lunatic may be a witnefs *in lucidis intervallis.*

(A 2.) Infidel.

So, generally, an infidel fhall not be a witnefs. *Co. L. 6. b. Vide cont. 2 Str. 1140.*[A Mahometan may be a witnefs, and fworn on the Koran. *At council, prefent two chief juftices, Fachina v. Sabine, M. 12 G. 22. Str. 1104. Morgan's cafe, Leach's Cro. Caf. 58.*][An infidel, pagan idolater, may be a witnefs, and his depofition, fworn according to the cuftom of the country where he lives, read in evidence. *Ormichund v. Barker, H. 18 G. 2. 1 Wilf. 84. 1 Atkyns, 19. Willes, 538.*]

(A 3.) Quaker.

[By *ft. 7 & 8 W. 3. c. 34.* made perpetual by *1 G. 1. ft. 2. c. 6.* and amended by *8 G. 1. c. 6. & 22 G. 2. c. 30. 46.* Quakers, inftead of an oath, fhall be permitted, in courts of juftice, to make their folemn affirmation, which fhall be of the fame force in law as an oath, and fubject them to the fame penalties, in cafe of perjury.][But they are not to be admitted as witneffes in criminal cafes; and by *32 G. 2. c. 46.* the affirmation of Quakers fhall be received in all

cases where an oath is required by any act of parliament, with the like penalty in case of false affirming; and with the like exception of criminal cases.]

[On this exception, it has been held, that the affirmation of a Quaker cannot be admitted on an appeal for murder. 2 Str. 854. cited Cowp. 392.]

[Nor, on a motion to ground an information for a misdemeanor. 2 Str. 872. 1 Barnard. K. B. 346.]

[Nor, to ground a motion for an attachment, unless by consent; and if by inadvertency a rule to answer the matters in an affidavit be made, when the affidavit was only by affirmation, it will be discharged. Andr. 200. 2 Str. 946.]

[Neither shall the affirmation of a Quaker be admitted to exculpate a third person against whom an application has been made for a criminal information. 2 Burr. 1117.]

[But to exculpate himself, it may be admitted. *Id. ibid.*]

[And a Quaker's affirmation has been held sufficient to prove the service of a rule to shew cause why an appointment of overseers should not be quashed; for this is not a criminal prosecution. 2 Str. 1219. cited. Cowp. 385.]

[So, the solemn affirmation of a Quaker (together with a tender of 20*l.* pursuant to *st.* 26 G. 2. c. 18.) entitles him to admission into the Turkey Company, without taking the oath prescribed by that act. 2 Burr. 999. 1005.]

[So, the affirmation of a Quaker shall be admitted in a *qui tam* action. Cowp. 382. 393. where this subject is discussed at full length.]

(A 4.) Person convicted of Treason or Felony.

So, a person attainted, or convicted, of treason or felony, shall not be a witness. *Co. L. 6. b.*

Or, of piracy. *R. 2 Rol. 686. l. 27.*

Tho' it be to excuse a man accused falsely by him and by the instigation of another. *R. 2 Rol. 686. l. 30.*

But a person pardoned for his treason or felony will be a good witness. *Per three J. two cont. Ray. 369. Dub. Ray. 380. R. cont. 2 Bul. 154. R. acc. for the pardon takes away pœnam et reatum. 1 Vent. 349.*

So, if he be burnt in the hand for felony; for that is *quasi* a pardon by statute. *R. Ray. 369. R. Ray. 380. R. Keil. 37. Vide post. (A 4.)*

So, an accomplice in the same crime before conviction. *R. Keil. 17.*

Tho' he has a promise of pardon, and the promise be not made for his evidence. *Keil. 18.*

(A 5.) Or, any infamous Man.

So, a man infamous in any respect shall not be a witness; as, if a champion in a writ of right be recreant. *Co. L. 6. b.*

If a man be attainted for a false verdict. *Co. L. 6. a.*

By the *st.* 5 El. 9. if convicted for perjury or subornation, till the judgment reversed.

So, if convicted of perjury at the common law. *Co. L. 6. b.*

[A person offering himself for bail may be asked, Whether he has not been in the pillory for perjury? *Rex v. Edwards, M. 32 Geo. 3. 4 T. R. 440.*]

So,

So, if convicted of forgery upon the *st.* 5 *El.* 14. or otherwise. *Co. L. 6. b.* 5 *Mod.* 74.

Or, of a conspiracy at the suit of the king. *Co. L. 6. b.*

Convict in *premunire.* *Ibid.*

So, if he had an infamous judgment, and upon that stood in the pillory, or tumbrel. *Co. L. 6. b.* 5 *Mod.* 74. *Sal.* 461.

Or, be stigmatized, or lose his ears. *Co. L. 6. b.*

Or, be whipt for *petit larceny.* *Per St. John at Suff. Ass.* 1657.

So, if he have judgment of the pillory, tho' he did not stand there. *R.* 3 *Lev.* 426. *Sal.* 689.

Or, be convicted of barrettry, tho' only fined; for the crime makes the infamy. *R.* *Sal.* 690.

So, tho' pardoned after a conviction of perjury, he shall not be a witness. 1 *Vent.* 349. *Sal.* 689.

So, a pardon of any crime, after examination, does not make his testimony good. *R.* 3 *Lev.* 426.

So, an *affidavit* of such a person in any cause shall not be admitted regularly.

But a conviction of felony, perjury, &c. does not take away his testimony unless the record be produced.

So, a record by which he is found guilty by verdict, is not sufficient, if judgment be not entred. *R.* 1 *Sid.* 51.

So, if he stood in the pillory, where the judgment was not infamous, it does not take away his testimony; as, for a libel, or words in slander of the government. *R.* 3 *Lev.* 426. *Semb.* 5 *Mod.* 75.

So, a man convicted of forgery upon the *st.* 1 *H.* 5. 3. shall be a witness. *Co. L. 6. b.*

Or, of barrettry. *Per Glin. and Newd.* *M.* 1657, *B. R.*; *sed Maind. cont. fortiter.* *R. cont.* *Sal.* 690.

So, a man outlawed in a personal action. *Co. L. 6. b.*

So, the pardon of an offence enables him to be a witness, except in perjury, where the disability is part of the judgment; as, if the felony, &c. of which he is convicted, be pardoned. *Per three J. two cont.* *Ray.* 369. *Cont.* 2 *Bul.* 154. *Dub. Ray.* 380. *R. acc.* 1 *Vent.* 349. *R.* *Sal.* 689.

So, if burnt in the hand for felony; for it is *quasi* a statute pardon. *R.* *Ray.* 369. 380. *Sti.* 388. *Per Trev.* 7 *Ann.*

And proof of the record whereby clergy is granted is sufficient, without proving that he was burnt. *Per Trev.* 7 *Ann.*

So, a pardon of perjury by act of parliament enables him. *Per Holt,* *Sal.* 689.

So, if there be not a legal objection against a witness, other scandal to his credit shall not be allowed; as, that he is a whore-master, drunkard, &c. *Mar. pl.* 136.

So, an *affidavit* of one convicted of perjury, &c. shall be allowed to prove a malpractice against him. *Sal.* 461.

[The *affidavit* of one convicted of forgery, cannot be read to support a complaint, but it may to defend himself against a complaint. *Walker v. Kearney,* *H.* 14 *Geo.* 2. *Str.* 1148.]

[(B 1.) Who shall be a Competent Witnesses.]

[Competency is implied in the term witness; and therefore, wherever, in acts of parliament which direct convictions on the oaths of witnesses,

witnesses, the epithet *credible* is added; it is intended only from abundant caution to declare, that tho' competent witnesses swear positively, their credibility is to be weighed; and if the magistrate think the evidence not credible, he ought not to convict. *D. per* *Ld. Mansfield, 1 Bur. 414.*]

[The general objection to the competency of a witness arises from an interest which he may have in the event of the cause; for in general a person is a competent witness unless he be so interested, and unless the verdict can be given in evidence by him in another suit. *3 T. R. 27. 308.*]

[It was holden, that where a corporation was lord of a manor, and had approved and leased a part of a common, that a freeman was not a competent witness to prove that a sufficiency of common was left for the commoners, because the rent must have been reserved for the use of the corporation. *Burton v. Hinde, B. R. E. 33 Geo. 3. 5 T. R. 174.*]

[The subscribing witness to a bond, if he is interested therein at the time of the attestation and the trial, cannot be examined as a witness to prove the execution; nor is proof of his hand-writing sufficient for that purpose. *Swire v. Bell, B. R. M. 34 Geo. 3. 5 T. R. 371.*]

[In trover by the assignees of a bankrupt to recover goods taken by the defendant under a fraudulent bill of sale given by the bankrupt to the defendant, (and which was an act of bankruptcy,) the defendant's examination before the commissioners, in which he admitted the execution of the deed, is sufficient evidence to prove the execution, and supercedes the necessity of calling the subscribing witness. *Bowles v. Langworthy, B. R. T. 33 Geo. 3. 5 T. R. 366.*]

[In an action on a bond, or to prove a petitioning creditor's debt which arises by bond, proof of the acknowledgment of the obligor does not supercede the necessity of calling the subscribing witness. *Abbot v. Plumbe, B. R. T. 19 Geo. 3. Dougl. 216.*]

[A bankrupt who has obtained his certificate, is not a competent witness to prove the debt of the petitioning creditor, or any other fact necessary to support the commission. *Chapman v. Gardner, C. P. H. 34 Geo. 3. 2 H. Bl. 279.*]

[In an action by the indorsee of a bill of exchange against the acceptor, the defendant cannot call the indorser as a witness to prove that the plaintiff had no right to recover upon the bill, having received it from the indorser merely in trust to obtain payment of it from the acceptor on account of the indorser himself. *Buckland v. Tankard, B. R. E. 34 Geo. 3. 5 T. R. 578.*]

[On an appeal against a poor-rate because certain persons were omitted to be rated, a parishioner who is liable to be rated, but in fact not rated, is a competent witness to prove the rateability of the appellants. *Rex v. Proffer, M. 31 Geo. 3. 4 T. R. 17. Rex v. South-Lynn, T. 34 Geo. 3. 5 T. R. 664.*]

[On an appeal between the parishes of *A.* and *B.* the forum may call an inhabitant of the latter who is not rated to the poor, and compel him to be examined as a witness. *Rex v. Little Lumley, H. 35 G. 3. 6 T. R. 157.*]

[An inhabitant of a parish who is not rated, is a competent witness on an appeal between that parish and another. *Ibid.*]

[The reputed mother is a competent witness to prove the illegitimacy of her children. *Rex v. Bramley*, T. 35 Geo. 3. 6 T. R. 330.]

[If *A.* have received money from *B.* to pay to *C.*, and the question be, Whether *A.* were the agent of *C.* for that purpose? *A.* may be called as a witness to prove the agency. *Ilderton v. Atkinson*, B. R. H. 38 Geo. 3. 7 T. R. 480.]

[A person who gives a bribe to another to vote at an election for members of parliament, is a competent witness to prove the bribery in an action for the penalty under the statute. *Mead v. Robinson*, C. P. T. 16 & 17 Geo. 2. Willes, 422.]

[Therefore, in covenant for rent upon a lease by *A.* to *B.*, if the point be in issue, Whether *C.*, whose title both admit, demised first to *A.* or another person? *C.* is a competent witness to prove the point in issue; for the verdict cannot be given in evidence in any action which may afterwards be brought by or against him. 3 T. R. 27. 308.]

[But if two persons are contending for the possession, who are to pay rent in different rights, then the landlord cannot be admitted to prove the demise in the ejectment. *Ibid.*]

[Where *A.* rented a tenement of *C.* who covenanted to reimburse him all the poor-rates, and *A.* underlet to *B.*; *A.* was held to be a competent witness to prove such letting to *B.* upon an appeal. 1 T. R. 262.]

[The vendor without covenant for good title or warranty, may be a witness to prove the title of the vendee. *Str.* 444.]

[And to be a witness, it is not necessary that he should be absolutely indifferent; for in such a case, his credibility may be left to the jury. *B. R. H.* 358.]

[And the bare possibility of a witness being liable to an action in a certain event, is no objection to his competency. 1 T. R. 163.]

[And in order to render a witness incompetent, it is necessary to shew that he must derive a certain benefit from the determination of the cause one way or another. *Ibid.*]

[Therefore a co-obligor in a bond to the ordinary under 22 & 23 Car. 2. c. 10. is a competent witness to prove a tender by the administratrix. *Ibid.*]

[So, a creditor of the administratrix is a good witness to the same purpose. *Ibid.*]

[And in order to take off the testimony of a person joined in the *simul cum*, evidence must be given of his being some way concerned in the fact, that process be issued against him, and that endeavours have been used to take him. *B. R. H.* 123. 264.]

[But a person who apprehends himself to be interested, cannot be a witness, tho' in strictness he be not interested. 1 *Str.* 129.]

[The guardian of an infant on record cannot be a witness for the infant. 1 *Str.* 506.]

[Nor, the prochein amy. 2 *Str.* 1026.]

[Whether the wife of prochein amy can? *Qu.* 1 *Str.* 106.]

[In an action against the sheriff for a false return, the bailiff who had the warrant was not allowed to prove an attempt to arrest. *Str.* 650. 2 *Ld. Raym.* 1411.]

[On an information for importing teas, contrary to the act of navigation, the master of the ship was produced by the defendant, but

was not allowed, because the ship was forfeited by the act. *Bunb.* 140. *Vide etiam; Bunb.* 203.]

[The creditor of a bankrupt cannot be admitted to prove the bankrupt a gamester; because by gaming the bankrupt's certificate is gone, and his allowance forfeited, and consequently the creditors' dividends are increased. *Str.* 507.]

[The borrower of money is a competent witness to prove the usurious contract, and the re-payment of the money. 4 *Bur.* 2251. 2256. *Smith v. Prager*, B. R. M. 37 *Geo.* 3. 7 *T. R.* 60. *Cont. Str.* 633.]

[But in a *qui tam* action on the statute of usury against the assignee of a bankrupt for taking usurious interest on a loan of money to the bankrupt before his bankruptcy, the bankrupt is not a competent witness to prove the offence, unless he has obtained his certificate or repaid the money. 2 *T. R.* 496.]

[Whether a servant can be a witness for his master, who has brought trespass for beating the servant, *per quod servitium amisit. Quere?* *Str.* 414. 595. 944.]

[A party who supports a cause, cannot be a witness. B. R. H. 202.]

[A tenant in possession is not a good witness to prove his landlord's possession, or to support his title, because it is to uphold his own possession. *Cowp.* 621.]

[In some cases even an interested person is a competent witness from necessity; as, where an agent of one person pays money to another, he shall be admitted to prove the payment, tho' he thereby discharges himself against his principal. 3 *T. R.* 29. *Vide Str.* 647.]

[So, in an action brought against a master for his carman's driving his cart negligently, *per quod*, &c. the carman may be a witness for his master. 2 *Str.* 1083.]

[A factor who sells for the plaintiff, and is to have poundage, may be admitted to prove the contract. 3 *Wils.* 40.]

[A person who has an interest may become a competent witness by releasing his interest, or by having a demand against him released; therefore if one underwriter has engaged to contribute to the costs of another, the defendant in an action on the same policy, and has joined as plaintiff in a bill in equity for a discovery; he may be made a competent witness by the defendant's releasing him from any contribution to the costs in law or in equity, and by an offer by himself and the defendant to pay the costs in equity, and to dismiss the bill as to them. 3 *T. R.* 27.]

[A servant or clerk who has embezzled money or notes of his master's, is an admissible witness (provided he has a release) against the person who received such money or notes from him, in an action for money had and received, brought by his master to recover the amount. *Cowp.* 199.]

[The creditor of a bankrupt who has released his debt to the assignees, tho' not to the bankrupt, may be a witness to prove the bankruptcy. B. R. H. 267.]

[Where two qualifications are necessary to be elected, he who has only one of them may be a witness to prove the qualifications. 2 *Ld. Raym.* 1353. 1 *Str.* 583.]

[And the member of a corporation who has acted under the right claimed, may be a witness to prove the usage. 2 *Str.* 1069.]

[And

[And a father who has gained his freedom in a borough by servitude may be admitted to prove a custom, by which his eldest son is entitled to his freedom. 1 *Will.* 332.]

[A mother may be a witness to prove her marriage when her son's legitimacy is in question. *B. R. H.* 277.]

[So, on a question of settlement, husband and wife may prove their own marriage. 2 *T. R.* 263.]

[In an action by a father for deflowering his daughter, *per quod servitum amisit*, the daughter may be a witness, but she must not give in evidence a promise of marriage. 2 *Str.* 1054. 3 *Will.* 18.]

[If a witness be disinterested at the time of a deposition taken, that deposition may afterwards be read, tho' he afterwards become interested. 1 *P. Will.* 289. *Vide* 1 *Str.* 101.]

[But on a trial at *nisi prius* it is said such a person cannot be examined as a witness. 1 *Str.* 101.]

[But in a later case, it has been held, that where the person was not interested at the time when the plaintiff or defendant first had an interest in his testimony, his evidence may be received, tho' he afterwards became interested; thus in an action against underwriters, the broker was admitted to prove circumstances which tended to discharge them, he having been disinterested at the time when they signed the policy; but having afterwards become interested by signing the same policy himself as an underwriter. 3 *T. R.* 27.]

[A person who is employed to sell goods, and is to have for himself whatever money he can procure for them beyond a stated sum, is a competent witness to prove the contract between the buyer and the seller. *Benjamin v. Porteus*, *C. P. H.* 36 *Geo.* 3. 2 *H. Bl.* 590.]

[If a surviving witness to a bond be made executor of the obligee in an action brought by him on the bond, evidence shall be admitted to prove the plaintiff's hand, as if he were dead. 1 *P. Wms.* 289.]

[A grantee, when he appears to be a bare trustee, is a good witness to prove the execution of a deed to himself. *Id.* 290.]

[Where two persons joined in an assignment of a ship, one of them was permitted to prove that at the time of the assignment he had no interest in the vessel. 1 *T. R.* 301.]

[A man is not a competent witness to impeach a security which he has given, tho' he be not interested in the event of the suit; therefore, where a bond was given in consideration of delivering up a promissory note, an indorser was not admitted to prove that the consideration of the note was usurious. 1 *T. R.* 296.]

[By *stat.* 27 *Geo.* 3. c. 29. parishioners are made competent witnesses in prosecutions, where the penalty is given to the parish, unless it exceed 20*l.* *Rex v. Davies*, *H.* 35 *Geo.* 3. 6 *T. R.* 177.]

[In an action by an indorsee of a bill of exchange against the acceptor, the latter may call the payee as a witness to prove that the bill was void in its creation. *Jordaine v. Lashbrooke*, *B. R. E.* 38 *Geo.* 3. 7 *T. R.* 601.]

[(B 2.) Husband and Wife.]

[Husband and wife shall not be called to give evidence for or against each other. *B. R. H.* 264. *Vide* 2 *T. R.* 263.]

[Therefore the wife's owning the receipt of money due to her husband, for wages earned by her, was considered as no evidence in an action brought by the husband. 2 *Str.* 1094. [The

[The wife of one defendant cannot be a witness for the other, in an indictment against two. 2 *Str.* 1095.]

[But in an indictment against the husband for an assault on the wife, the wife herself has been admitted as a witness. 1 *Str.* 633.]

[They shall not be admitted in *any* case to give evidence, even tending to criminate each other. Therefore in a case of settlement, where a marriage in fact had been proved between two paupers, the first wife of the husband was not admitted to prove a former marriage with him, because such evidence would have tended to a prosecution against him for bigamy. 2 *Term Rep.* 263.]

[But in an action between third persons, a wife may be admitted to give evidence, which throws the debt upon her husband. Thus, in an action against the daughter's husband, for the daughter's wedding clothes, her mother was admitted to give evidence, which shewed that they were delivered on the credit of the mother's husband. 1 *Str.* 504.]

[So, where the contract is made with the wife, in some cases the wife's declaration may be given in evidence in an action against the husband. Thus, the wife's declaration that she had agreed to pay 4s. a-week for nursing a child, was allowed to be given in evidence to charge her husband; the chief justice observing, that matters of that kind were properly under the direction of the wife. *Id.* 527.]

[Husbands and wives cannot in any case be witnesses either for or against each other. *Davis v. Dinwoody*, B. R. E. 32 Geo. 3. 4 T. R. 678.]

[In an action by husband and wife in right of the wife as executrix, no declarations of the wife can be given in evidence by the defendant. *Alban v. Pritchett*, B. R. E. 36 Geo. 3. 6 T. R. 680.]

[In an action for enticing away the plaintiff's wife, the declarations of the wife are inadmissible. *Winsmore v. Greenbank*, C. P. T. 18 & 19 Geo. 2. *Willes*, 577.]

[(B 3.) On an Indictment.]

[On an indictment for destroying a note, the proprietor may be a witness. 1 *Str.* 595.]

[So, an indictment for forging a letter of attorney, by which the prisoner transferred the stock of A.—A. was admitted as a witness. 2 *Str.* 728. *Vide Ib.* 1229.]

[So, the prosecutor of an indictment, tho' he had laid a wager that he should convict the defendant. 1 *Str.* 652.]

[If two be indicted, and one submit and pay a fine, he may be examined as a witness for the other. 1 *Str.* 633.]

[So, if one indicted plead misnomer, and for want of a replication be discharged, he may be a witness for the other defendants. B. R. H. 303.]

[But on an indictment for perjury, in denying in an answer an agreement not to put a note in suit; the giver of the note, defendant at law, and plaintiff in equity, has been refused to be admitted as a witness. 2 *Str.* 1043. B. R. H. 265.]

[The defendants in ejectment against whom a verdict has been given, cannot be witnesses for the prosecutor, on an indictment for perjury committed on that trial. 2 *Str.* 1104.]

[(C 1.)

[(C 1.) At what Time Exception shall be taken to a Witness.]

[Formerly the rule was to object to the witness before he was sworn in chief; and the objection must still be made at the trial. 1 *T. R.* 717.; and it is too late to object to him after he has been examined and cross-examined. 4 *Burr.* 2251. *Vide B. R. H.* 358.]

[And an objection to the competency of witnesses, discovered after trial, is not a sufficient ground of itself for applying for a new trial; but it may have some weight with the court, where the party applying appears to have merits. 1 *T. R.* 717.]

[(C 2.) When a Person shall be compelled to give Evidence.]

[If one of the bail be a subscribing witness, he shall be obliged to give evidence. 1 *Str.* 406.]

[And if he be a material witness, the court will permit his name to be struck out of the bail-piece, and another entered in his place. *B. R. H.* 133.]

[But the court will not give leave to strike out the name of a defendant in ejectment, on affidavits that he is not interested in the premises, and is a material witness for the other defendants; especially if the jury process, and the subpoenas have issued. *Id.* 162.]

[An attorney present at the swearing of an answer in Chancery, is not obliged to be a witness, on an indictment for perjury in the answer. 2 *Str.* 1122.]

[(C 3.) To what a Witness shall be examined.]

[If a witness be examined by the party producing him, to one point only, the adverse party may examine him to that, but not use him to prove a different fact. 2 *Atk.* 44.; *sed. qu.* as to the latter part.]

[The party who excepts to a witness may call him afterwards. 1 *Str.* 480.]

[(C 4.) Trial put off when the Witness cannot be compelled to attend.]

[If one of the parties wish to have the testimony of witnesses whom he cannot compel to attend, the court may put off the trial from time to time, till the other party consent, that depositions may be taken where they are. *Coamp.* 174.]

[But leave cannot be had to examine an ancient witness before a judge without consent. *Barnes*, 447.]

[(C 5.) Remedy against a Witness who wilfully absents himself.]

[A witness who wilfully absents himself may be attached for the contempt; or an action on the case will be against him. *Doug.* 561.]

[And by *stat. 5 El. c. 9. s. 12.* if any person on whom any process out of any of the courts of record within this realm, or *Wales*, shall be served, to testify concerning any cause or matter depending in any of the said courts, and having tendred unto him according to his countenance or calling, such reasonable sums of money as, having regard to the distance of the places, are reasonable to be allowed in that

that behalf, do not appear according to the tenor of the said process, having not a lawful or reasonable let or impediment to the contrary, then the party making default shall lose and forfeit for every such offence 10 *l.*, and yield such further recompence to the party grieved, as, by the discretion of *the judge* of the court out of which the said process shall be awarded, &c. to be recovered by action of debt, &c.]

[This further recompence must be assessed by the court out of which the process issued, not by the jury or judge at *nisi prius*. *Doug.* 556.]

Vide more concerning *Witnesses*, in *Chancery*, (P 7.)—*Evidence*, (A 3.)—*Fait*, (B 4.)—*Parliament*, (E 11.—L 25.)—*Trial*, (B 5.)

T H R E A T S.

Vide *Battery* (D).—*Pleader*, (2 W 20.)

T I M E.

Vide *Temps.*

T I T H E S.

Vide *Dismes*.

T I T L E.

Vide *Affise*, (B 17. 20.)—*Maintenance*, (A 5.)—*Pleader*, (C 34. 36. 40, 41, 42. 49.—E 21.—F 13.—3 M 40.—3 O 2.)—*Prohibition*, (F 2.)—*Remitter*, (C 1.)

T I T L E O F E N T R Y.

Vide *Discent*, (D 10.)

T O L L.

(A) The several Kinds of Toll.

TOLL, *tolnetum*, *telonium*, or *theolonium*, are all of the same import, and signify a sum of money paid by the buyer for goods or merchandizes exported or imported, or sold within the realm. 2 *Inst.* 58. [*Vide* 1 *Wils.* 109. *Vide* *Prærogative*, (D 48.)]

As, to toll in a market, picage, and stallage, *vide* in *Market*, (F 1, &c.)

So, the king, or a subject, owner of a port, may prescribe for toll for merchandize there imported, without any consideration; for the owner is indictable, if he does not repair the port. *Semb. Lut.* 1523. *Semb. 1 Mod.* 104.

So, for toll for murage; for it will be for the benefit of the people that the walls of a town for defence of the country are repaired. *Græ El.* 711.

(B) Toll-Turn.

SO, toll may be payable for cattle or goods in their return from a fair or market. *Bl. Nom. verb. Toll. 1 Sid. 454. Cro. El. 711.*

(C) Toll-thorough.

TOLL-thorough is a sum demanded for a passage through an highway. *Bl. Nom. verb. Toll. 22 Aff. pl. 58.*

Or, for a passage over a ferry, bridge, &c. *Bl. Nom. verb. Toll.*

Or, for goods which pass by such a port in the river. *1 Mod. 47.*

1 Sid. 454.

And, it may be demanded in consideration of the repair of the pavement in a high street. *Jon. 162. [Vide 2 Wils. 296.]*

Or, of the repair of a sea-wall, bridge, &c. *R. Jon. 162.*

Cleansing of a river, &c. *1 Mod. 48.*

But toll-thorough cannot be claimed, simply, without any consideration. *R. Jon. 162. R. Mo. 575. 1 Mod. 47. 2 Mod. 143. 4 Mod. 320. D. cont. 1 Mod. 232. R. 1 Sid. 454. Per Popb. two J. cont. Cro. El. 711. 2 Rol. 522. l. 37.*

As, if one demands 2d. for every score of sheep that pass by such a town; for this would be a toll for passage in an highway. *R. Mo. 575. Cro. El. 710.*

So, toll for a ship that comes to such a point cannot be demanded without a consideration; for the sea is free for all. *R. 1 Mod. 104.*

For cattle that pass by such a bridge. *Semb. 3 Lev. 400.*

So, it cannot be claimed from those to whom the consideration does not extend; as, a custom, that upon consideration that the city of N. maintains a quay for all goods imported upon the river to the city, they ought to take for every ship upon the river, passing by the quay, so much, is not good for ships which do not load or unload at the quay. *R. 1 Vent. 71. 1 Mod. 71. R. 2 Lev. 96.*

[So, a prescription to take toll for passing thro' the streets of G. in consideration of repairing divers streets there, is bad; for that is no consideration for toll in the other streets which he does not repair. *Truman v. Walgham, P. 6 G. 3. Wils. 296.*]

So, it cannot be claimed as appendant to a manor, for it depends upon the will of a stranger, not of the lord himself; and therefore must be claimed as an easement. *Kel. 152. a.*

[A prescription to take toll for passing on an ancient navigable river thro' the plaintiff's manor, is bad in law. *Mayor of Nottingham v. Lambert, C. P. T. 11 & 12 Geo. 2. Willes, 111. Vide 3 T. R. 263.*]

[A prescription for toll-thorough cannot be supported in law, unless a consideration be shewn for it. *Willes, 111.*]

[*Aliter* of a toll-traverse, where a consideration is implied. *Ibid.*]

[But if a person claiming a toll for passing over an highway, can shew that the liberty of passing over the soil, and the taking of toll for such passage, are both immemorial, and that the soil and the tolls were, before the time of legal memory, in the same hands, tho' severed since; it will be presumed that the soil was originally granted to the public in consideration of the tolls, and such original grant is a good consideration to support the demand. *1 T. R. 660.*]

(D) Toll-traverse.

TOLL-traverse is a sum demanded for passage over the private soil of another. *Bl. Nom. verb. Toll.* 1 *Sid.* 454. *Cro. El.* 711. 22 *Aff. pl.* 58.

And this toll may be demanded without alleging any consideration for it. *Mo.* 575. 2 *Mod.* 143.

As, if the lord of a manor has a wharf near a navigable river, and demands 2 *d.* *per ton* for all goods put upon the land within his wharf, tho' he does not say, upon the wharf. *R.* 3 *Lev.* 425. 2 *Lev.* 97. [*Vide Cowp.* 47.]

If the lord claims 2 *d.* for all wares sold within his manor, without saying, in a fair or market. *Dub.* 4 *Mod.* 319.

(E) Who may demand Toll.

A Man may be entitled to have toll by prescription or grant. 4 *Mod.* 319. [1 *Wilf.* 109.]

So, if the soil, in which a fair or market is held by prescription, comes to the crown, neither the fair, &c. nor the toll there due, are extinguished. *Mo.* 474.

So, if a manor to which toll is appurtenant, comes to the king, the toll continues appurtenant. 1 *Mod.* 232. 2 *Mod.* 144.

So, if the king grants a fair or market, he may also grant to the grantee to take a reasonable sum for toll. *Mo.* 474.

And the grant will be good; tho' the charter does not express the sum in certain. *Per three J. Mont. cont. Pal.* 86.

So, if a man builds a new bridge, or a wall against the sea, &c. the king may grant to him to take pontage, or murage; for it is for the ease of the people. *Mo.* 474.

But the king cannot grant a toll for goods not brought to market. *Lut.* 1502.

[Toll-bars cannot be erected out of the place for which toll is demanded. *Attorney-General v. Ayre, in Sc. M.* 1720, *Bunb.* 68.]

[(E 2.) Remedy for Toll.]

[A general *indebitatus assumpsit* will lie for tolls. 1 *T. R.* 616.]

(F) When no Toll can be due.

BUT toll cannot be claimed except by grant or prescription.

So, tho' a man may make an agreement for goods landed out of a ship upon his land; yet he cannot take 2 *d.* for every barrel, or other sum certain for goods landed there; for that would be to raise a toll or custom without the consent of the king. *R.* 2 *Roll.* 171. *l.* 10.

(G) Who shall be quit of Toll.

(G 1.) By Prescription.

PERSONS may be quit of toll by prescription, or the king's grant; as, a city, or borough, may prescribe to be quit of toll. *F. N. B.* 226. *l.* The

The inhabitants of a borough may prescribe for passage in a ferry without toll. *Adm.* 1 *Sal.* 12. *R.* 3 *Mod.* 293.

So, the king is quit of all tolls by his prerogative. *Pal.* 85.

So, by the custom of the realm, tenants in *antient demesne* may claim to be quit of toll in all fairs and markets within the realm, for goods bought or sold for or out of their tenements. *F. N. B.* 228. *A. Vide Antient Demesne*, (F 4.)

So, by the custom of the realm, ecclesiastical persons ought to be exempt from pontage, murage, &c. *Pal.* 85. *Vide Ecclesiastical Persons* (D).

(G 2.) By Grant.

So, the king by his charter may grant, that the inhabitants of such a town, borough, &c. shall be quit of toll in every place in *England*. *Lut.* 1332. *Vide Prerogative*, (D 33.)

That such an abbot, bishop, &c. *et homines sui sint quieti ab omni theolonio in omni foro, nundinis, et transitu, per totum regnum.* 2 *Roll.* 202. l. 15.

But such grant, that he *et homines sui sint* quit of toll, &c. extends only to toll for their own proper necessities, not if they buy or sell as common merchants. 2 *Roll.* 202. l. 15.

(H) Remedy for Freedom from Toll.

(H 1.) By Writ *de essendo quiet. de Thelonio*.

IF a man who ought to be quit of toll be charged, he may have a writ *de essendo quiet. de Thelonio*. *F. N. B.* 226. l.

[But an action will not lie on this writ until the plaintiff's goods be actually distrained. 1 *H. Bl.* 206. 4 *T. R.* 130.]

(H 2.) By Actions.

So, if a man takes toll, when it is not due, or more than is due. or of him who is exempt, an action upon the case lies. *R.* 1 *Sal.* 12. *Vide Market*, (F 1.)

Or, trespass. *Lut.* 1329. 1 *Sal.* 248.

So, if the cattle or goods of any exempt are distrained for toll, he may have a *replevin*.

Vide more concerning Toll, in Antient Demesne, (F 4.)—*London*, 1.—*Market*, (F 1.)

Toll-Booth.

Vide Market, (F 1.)

TOLT.

Vide Droit, (B 5.)

TOMBS.

Vide Cemetery (C).

TONNAGE AND POUNDAGE.

Vide Parliament, (H 12.)—(Trade, C 1, &c.)

TOUTS TEMPS PRIST.

Vide Pleader, (2 Y 5.)

TOWER COURT.

Vide Courts, (O 8.)

TOWN.

Vide Parishes, (C 1, 2.)—Leet, (O 3.)

TOWN CLERK.

Vide Franchises, (F 27.)

TRADE.

(A) Liberty of Trade.

(A 1.) By Merchants Strangers.

TRADE is beneficial to the commonwealth. 11 Co. 86. a.
1 Rol. 4.

All trades, mechanical or others, which avoid idleness, and exercise men in work for the maintenance of them and their families and the increase of their substance. 11 Co. 86.

By the *st. M. Ch. 9 H. 3. 30. omnes mercatores, nisi prohibiti, habeant saluum et secur. conduct. exire de Angliâ, venire in Angliam, morari et ire per Angliam per terram aut equam ad emendum, vel vendendum.* Confirmed by the *st. 2 Ed. 3. 9.*The *magna et parva custuma*, and also tonnage and poundage, were granted for safeguard of the sea. 2 Rol. 175. l. 10. *Vide in Parliament, (H 11, 12.)*By the *st. 18 Ed. 3. 3.* the sea shall be open to all manner of merchants to pass where they please.So, by the *stat. of the Staple, 27 Ed. 3. 2.* all merchants strangers, not of enmity, may safely come and dwell in the realm, where they will, and thence return with their ships, wares, &c. and freely sell, &c. paying the customs due.So, by the *14 Ed. 3. st. 2. 2.*So, by the *st. 9 Ed. 3. 1.* and *25 Ed. 3. 2.* all merchants strangers, and denizens, or any other, may sell corn, &c. and every other thing vendible, to whom they please, foreigners or denizens, except the king's enemies; and any charter, proclamation, allowance, judgment, &c. to the contrary shall be void. Confirmed by the *st. 11 R. 2. 7.*By the *st. 2 R. 2. 1.* all merchants aliens of amity with the king, may safely come within the realm; and in all cities, boroughs, &c. abide

abide with their goods as long as they please without disturbance; and sell and buy in grofs and by parcels to whom, and of whom they please. And return, &c. by the *ft.* 5 *R.* 2. 1.

But this was restrained by the *ft.* 16 *R.* 2. 1. that merchants aliens shall not sell by retail, except victuals.

(A 2.) *Remedy upon disturbance.*] By the *ft.* 9 *Ed.* 3. 1. (confirmed by the *ft.* 2 *R.* 2. 1. 11 *R.* 2. 7.) he that gives disturbance to a merchant contrary to this statute, shall yield to the merchant double damages; and, if attainted, shall have a year's imprisonment, and be ransomed at the king's will.

By the same *stat.* if disturbance be to a merchant stranger, or denizen, in city, borough, &c. which hath franchise, and the mayor, &c. on request give not remedy, and be thereof attainted, the franchise shall be seized into the king's hands.

In a town which hath no franchise, if the lord, or his bailiff, or constable, &c. being required to do right, do it not, they shall yield to the plaintiff his double damages.

So, by the same *stat.* the chancellor, treasurer, and justices, assigned to hold the king's pleas, in the places where they come, shall inquire of such disturbances, and the same punish, &c.

Or, the king by commission under the great seal may assign persons to inquire and punish the same; and this was also allowed by the *ft.* 25 *Ed.* 3. 2.

And by the same *stat.* 25 *Ed.* 3. 2. every person who will sue (on such disturbance) may have a writ in the *Chancery* to attach the disturber, and cause him to answer in the king's court.

And therefore, where a merchant stranger delivers his goods to a carrier to be carried to a port, which are by him feloniously embezzled, he may sue in *Chancery* for relief, where there shall be speedy dispatch, and need not proceed at the common law. 13 *Ed.* 4. 9. b.

So, by the *ft.* 27 *Ed.* 3. 2. if any by colour of his office, or otherwise, take any thing of merchants against their agreement, he shall be arrested by the mayor and bailiffs of the place, if out of the *staple*, or by the mayor and ministers of the *staple*, if in the *staple*; and speedy process shall be against him from day to day according to the law of the *staple*, and not at the common law.

So, by the *ft.* 27 *Ed.* 3. 20.

And therefore, he shall have advantage of the *law merchant*, tho' it be not conformable to the common law. 13 *Ed.* 4. 9. b. 2 *Rol.* 114.

And shall have speedy remedy. 13 *Ed.* 4. 9. b. 2 *Rol.* 114.

(A 3.) *But an alien shall not be a merchant or factor in the English plantations in Asia, Africa, or America.*] But by the *ft.* 12 *Car.* 2. 18. f. 2. no alien, unless naturalized, or made denizen, shall exercise the trade of a merchant or factor in any of the places there named, (viz. the lands, islands, plantations belonging, or which may belong, to the king or his successors in *Asia, Africa, or America*;) on pain of forfeiture of all his goods, or which are in his possession, &c.

(A 4.) *Importation restrained.*] So, by the *ft.* 11 *Ed.* 3. 3. no
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merchant shall import cloths not made within the king's dominions, on pain of forfeiture of the cloths.

Nor, by the *st.* 3 *Ed.* 4. 4. woollen caps, or woollen cloths, cards for wool.

Laces, corsets, ribbands, fringes of silk and thread, laces of thread, silk twined or embroidered, laces of gold, of silk and gold, saddles, stirrups, harness to saddles, spurs, bosses of bridles.

Andirons, gridirons, locks, hammers, pinfords, girdles of iron, latten, steel, tin, or alkmine, fire-tongs, dripping-pans.

Points, purses, gloves, girdles, harness for girdles, hats, brushes.

Dice, tennis-balls, chess-men, playing cards.

Any thing wrought of tawed leather, tawed furs, buskins, shoes, galoches, or corks.

Knives, daggers, wood-knives, bodkins, sheers for taylors, scissors, razors, sheaths, pins, pattens, pack-needles, forcers, caskets, rings of copper or latten gilt, chafing-dishes, hanging candlesticks, chafing-balls, sacring-bells, curtain-rings, ladles, scummers, counterfeit basons, ewers, painted ware, or white wire thread, to be sold within this realm, (unless wrought in *Ireland*,) on pain to forfeit the same; a moiety to the king, and a moiety to him who shall seize them.

So, by the *st.* 1 *R.* 3. 12. no merchant stranger shall import to be sold any girdles, harness for girdles, points, leather, laces, purses, pouches, pins, gloves, spurs, sheers, shoe-buckles, bells, (except hawks' bells,) curtain-rings.

Knives, hangers, taylors' sheers, scissors, andirons, cobbards, tongs, fire-forks, gridirons, stock-locks, keys, hinges, garnets, painted glasses, painted papers, painted forcers, painted images, painted cloths, beaten gold or silver for painters, saddles, saddle-trees, horse-harness, boots, bits, stirrups, buckles, chains, latten nails with iron shanks, turnets, standing candlesticks, hanging candlesticks, holy-water-stops, chafing-dishes, hanging lavers, tin or leaden spoons, latten or iron wire, iron candlesticks, grates, horn for lanthorns, on pain of forfeiture; a moiety, &c. *ut supra*.

So, by the *st.* 19 *H.* 7. 21. none shall import silk wrought by itself, or with stuff, in ribbands, laces, girdles, corsets, calls, or points.

Nor, by the *st.* 25 *H.* 8. 9. and 33 *H.* 8. 4. any thing made of tin, or pewter.

Nor, by 5 *Eliz.* 7. rapiers, daggers, knives, hilts, pummels, lockets, chapes, handles, scabbards, or sheaths for knives, &c.

(A 5.) By the King's Subject.

(A 5.) *In foreign countries.*] By the *st.* 15 *Ed.* 3. 3. the seas shall be open to all merchants to pass with their merchandize, where they please.

So, by the *st.* 3 *Jac.* 6. all subjects of *England* may trade to and from *Spain*, *Portugal*, and *France*, paying their customs and duties, notwithstanding any incorporation made by the king to any to have a sole trade there.

[By *st.* 23 *G.* 2. c. 13. any person soliciting, &c. any artificer in any manufacture of *Great Britain* or *Ireland* to go abroad, forfeits 500*l.* and imprisonment for one year; second offence 1000*l.* and two years' imprisonment.]

[Person

[Person exporting tools in the silk and woollen manufacture, forfeits the tools and 200 *l.*; captain taking on board, 100 *l.*; captain of king's ship, 100 *l.*, and cashiered; custom-house officer signing cocket, 100 *l.*, and forfeits his place.]

(A 6.) *Within the kingdom.* When they shall use a trade by the common law.] So, by the common law every subject may exercise himself in every lawful trade. 11 Co. 53. b. Hob. 211.

So, he may use several trades or mysteries, if he pleases. 11 Co. 54. a. Hob. 211. Cont. 2 Rol. 392. Pal. 396.

And the st. 37 Ed. 3. 6. which required that every man held himself to one mystery, was presently repealed. 11 Co. 54. a.

So, he might use a trade, wherein he had knowledge, tho' he never was apprentice, or instructed in it. 1 Sand. 312.

[By the maritime law, it is cause of confiscation in a subject to trade with an enemy, provided he be taken in the act; but this does not extend to a neutral vessel. 1 T. R. 85.]

(A 7.) *When not.*] But by the common law a man cannot use a trade in which he is insufficient. 2 Rol. 392. Pal. 397.

And for a misfeasance to the prejudice of any, an action upon the case lies against him. 1 Sand. 312.

So, a man who professes one trade, cannot use a thing proper to another trade, tho' it be in reference to the commodities used in the trade which he professes; as, a bricklayer cannot do a thing proper to the trade of a plasterer, where they are distinct trades. R. 2 Rol. 391. But it was contrary to a bye-law. Pal. 396.

So, a wheel-wright cannot use the trade of a smith for making his wheels. Per Holt, Sho. 267.

[A trade is not transmissible, but is put an end to by the death of the trader; and if executors carry on trade, they must do it as individuals for their own advantage, and at their own risk, unless under the direction of the court of Chancery. 1 T. R. 295.]

(B) Regulation of Trade by the King's Charter.

THE king by his charter may constitute fraternities, or companies, for the management of foreign or domestic trade.

For trade cannot be maintained or increased without order and government; and therefore, the king may erect *gildam mercatoriam*, a fraternity or incorporation of merchants, for the advancement of trade. 8 Co. 125. a.

And none but the king can erect a society for trade. Skin. 224.

So, the king by his grant may require, that all ships which come to such an haven, unload in such a place, for the security of the customs. Hard. 55.

That ships shall unload in a public place, and not elsewhere. 1 Rol. 5.

That tonnage be paid at such a port, more convenient for the king's officers, and not prejudicial to the subject. Per Dod. 1 Rol. 5;

So, a grant by the king to the corporation of weavers in London, rendering a rent, that none shall intermeddle with their trade, unless he be free of their fraternity, is good. Hard. 55. Vide post. (D 1.)

So, a grant to *London*, that every one who brings saleable goods there, shall pay such a toll, will be good. *Hard.* 55.

So, the king by his patent may grant that such persons shall have the sole printing of books of the common law. 2 *Ca. Ch.* 67. *Acc. in Domo Proc.* 1 *Ver.* 120. *Skin.* 234. *R. Cart.* 90.

Or, the sole printing of almanacs. *Semb.* 2 *Ca. Ch.* 66. *Skin.* 234.

Or, the printing of the statute-books; for they are matters of state. 2 *Ca. Ch.* 76. 93. 1 *Ver.* 120. 275.

Or, *English* bibles. 2 *Ca. Ch.* 93. 1 *Ver.* 120.

So, by patent, the *stationers* have the sole printing of bibles, testaments, common-prayer-books. *Cart.* 90.

So, for civil-law books, school-books, almanacs. *Cart.* 90.

But a patent, granted to *Moor* by *King James* for the sole printing of books of the common law, does not extend to new books of the law never printed before the patent. *R. per ten J.* 1668. 2 *Ca. Ch.* 67.

So, if the king grants power to the *stationers* for printing such books, he cannot afterwards grant to the *university* to print the same books. *Dub. Skin.* 234.

Vide post. (D 1. 4.)

(C) Charge upon Trade.

(C 1.) Customs of Tonnage and Poundage, &c.

SO, merchandizes may be charged with customs or duties to the king.

By the *st.* 14 *Ed.* 3. *sess.* 2. 2. merchants shall be free to trade, paying their customs due.

The old and new customs originally commenced by parliament. *Vide Parliament*, (H 11.)

No customs are due but by common consent of parliament. *Vide Parliament*, (H 9, &c.)—*Prerogative*, (D 43.)

By the *st.* 12 *Car.* 2. 4. the parliament grant to the king on every ton of wine from *France* brought into the port of *London* by way of merchandize, by a subject born, 4 *l.* 10 *s.*; by an alien, 6 *l.*; into any other port by a subject, 3 *l.*; by an alien, 4 *l.* 10 *s.*

On every butt or pipe of sweet wines brought into the port of *London*, by a subject, 2 *l.* 5 *s.*; by an alien, 3 *l.*; into another port by a subject, 1 *l.* 10 *s.*; by a stranger, 2 *l.* 5 *s.*

On every aum of *Rhenish* or *German* wine by a subject into any port, 1 *l.*; by a stranger, 1 *l.* 5 *s.*

By the *st.* 1 *Ann.* 13. *f.* 112. *Hungary* wines imported by *Hamburg* shall pay as *German* wines.

By the *st.* 12 *Car.* 2. 4. on all goods carried out of the king's dominions, or brought into the same by way of merchandize, by subject, denizen, or alien, poundage of 12 *d.* for every 20 *s.* value, according to the valuation in the book of rates; and 12 *d.* more *per* pound by a merchant stranger for native commodities exported, except such as in the same book are custom-free.

And by the same *st.* *f.* 3. if any goods be shipped or put into a boat or vessel to the intent to be carried beyond sea, or be brought from beyond sea into any port, &c. by way of merchandize, and unshipped,

shipped, &c. the customs due not paid or tendred to the collector or his deputy, with consent of the comptroller or surveyor there, or one of them, nor agreed for at the custom-house, shall be forfeited; a moiety to the king, a moiety to him who shall seize or sue for the same.

(C 2.) *Due upon importation.*] And therefore the goods are forfeited, where bulk is broke, or there is a manifest intent to do it, before the customs paid, tendred, or agreed for. *Forst.* 47. *R. Hard.* 360.

So, any goods imported to be sold, tho' they are taken by way of reprisal. *R. Cro. El.* 534.

So, by the common law customs are due by the importation, where any act is done by way of merchandize; as, bulk broken, part of the goods sold, &c. *Per Hale, Hard.* 362.

So, by the *st.* 12 *Car.* 2. 4. goods on importation are liable to customs, tho' by the first rule of rates they are not paid till the landing, and for so many goods as are put upon land. *Ibid.*

And therefore, the information must say that they are imported by way of merchandize; for it is not sufficient to say that they were put upon land as merchandize. *R. Cro. El.* 534.

[If a ship is within the limits of the port, it shall be deemed an importation; as, if it be twenty miles below the *Hope*, it is within the limits of the port of *London*. *Leaper v. Smith, in Sc. T.* 1721, *Bunb.* 79.]

[Information for treble value, on *stat.* 8 *Ann.* c. 7. *ff.* 30. for assisting, &c. at the time of unshipping, in unshipping wines, lies only against persons actually present. *Attorney-General v. Flower, H.* 1726, *Bunb.* 227.]

[But if a person, tho' not present at the running or carrying to his house, afterwards pays the men for doing it, it is a *being concerned*, and information lies. *Attorney-General v. Woodmasts, H.* 1727, *Bunb.* 247.]

[If the information is for assisting, or being otherwise concerned, *tempore exonerationis*; yet personal presence is not necessary, if he gave particular directions when and where the goods were to be landed and received. *Attorney-General v. Lake, M.* 1729, *Bunb.* 277.]

[Wheat-meal imported shall pay duty as wheat by 22 *Car.* 2. *Jobson v. Selwin, H.* 1729, *Bunb.* 281.]

[Goods (as wearing apparel) not imported as merchandize, are not liable to pay any duty, by 13 & 14 *Car.* 2. c. 11. *Chapman v. Lamb, M.* 6 G. 2. *Str.* 943.]

[Ships taken as prizes by *British* men of war are liable to, and must pay 5 *l.* per cent. duty charged on goods by 12 *C.* 2. c. 4.; but tho' liable to other imposts created since 1665, yet they have never been paid, and it is considered as a waiver. *Camplin v. Bullman, H.* 1 G. 3. *Parker*, 198.]

[But foreign sails of such ships taken are not liable to 1 *d.* per c'l by 12 *Ann.* c. 16. & 19 *G.* 2. c. 27.; for when the ship becomes *British*, the sails do so too. *Ibid.*]

(C 3.) *When not due.*] But goods wrecked are not forfeited, tho' the customs are not paid. *Cro. El.* 534. *R. Vau.* 161. *Vide Wreck.*

So, by the *st.* 12 *Car.* 2. 4. *f.* 15. prize-wines ought not to pay tonnage of custom.

So, by importation, if it be not by way of merchandize; as, by default of victuals, stress of weather, &c. customs are not due till landing. *Per Hale, Hard.* 362.

So, if an agreement be made for customs with the deputy of the customer, who acts as such, tho' he be only the deputy of a deputy; for the merchant cannot examine his authority. *R. Cro. El.* 534.

So, if the agreement be for all goods generally, without shewing the particular goods imported, when they are goods taken by way of reprisal, the certainty of which is not known. *R. Cro. El.* 534.

So, where tonnage and poundage is given by the *st.* 12 *Car.* 2. 4. viz. 12*d.* per pound, and by another statute an additional duty of 6*d.* per pound is given, and 5*l.* per cent. allowed to the merchant by the first act, the allowance shall be the same out of the additional duty, for they are incorporated. *Per three Bar. Hard.* 349.

So, by the *st.* 12 *Car.* 2. 4. on due entry made of wines imported, 12*l.* per cent. shall be allowed for leakage. But this shall be upon entry of the whole quantity put on board the ship. *R. Hard.* 360.

And by the same statute, *f.* 4. if the goods of a subject born be taken on the sea by enemies or pirates, or perish in a ship, taken, or perishing, whereof duties were paid or agreed for, on proof, &c. before the treasury or chief baron, recorded and allowed in the *Exchequer*, and certified to the officers of the customs, he, his executor or administrator, may ship in the same port so much other goods as those lost amounted to in custom, without paying any duty.

So, by the *st.* 12 *Car.* 2. 4. *f.* 14. all wines imported in *London*, or elsewhere, shall be free from the duty of excise.

(C 4.) *Drawback allowed.*] By the *st.* 12 *Car.* 2. 4. *f.* 13. if wine, for which the additional duty is paid or secured, be exported in twelve months after importation, the duty shall be repaid, or the security discharged. *Vide infra.*

By the *st.* 1 *Jac.* 2. 4. *f.* 4. 7. importer of tobacco and sugar, on exportation in eighteen months, shall be repaid the duties by him paid on the importation, or on a certificate of bond to export in four months by the buyer, and certificate of the searcher, that they have been shipped, and oath by the merchant that they have not been re-landed, &c. the security for duties by this act shall be discharged; but the duties of this act continued only to 1693. (Continued by 7-*W.* 3. 10. till 1706, by 8 *Ann.* 13. till 1720.)

By the *st.* 1 *W. & M.* sess. 2. 6. merchant exporting coffee, tea, or chocolate, in six months after importation, shall be repaid two-thirds of the duties by him paid by virtue of the said act.

So, by the *st.* 9 *Ann.* 11. *f.* 39. on exportation of leather.

So, by the *st.* 2 *W. & M.* sess. 2. 4. on exportation of *East-India* goods, wrought silks, &c. in twelve months after importation, the duties thereby laid shall be wholly repaid, or the security vacated.

So, by the *st.* 4 & 5 *W. & M.* 5. *f.* 6. on exportation of goods charged by that act, except brandy.

And, by the *st.* 6 & 7 *W.* 3. 18. *f.* 12. on exportation of glass, stone and earthen wares.

By the *st.* 9 *W.* 3. 23. *f.* 9. on exportation of sugar refined in *Eng-*
land, 3*s.* per cent. allowed. By

By the *ft. 1 Ann. feff. 2. c. 3. f. 18.* on exportation of malt, drawback of duties paid.

So, by the *ft. 12 Ann. 2. f. 21.*

By the *ft. 9 Ann. 12. and 10 Ann. 19.* on exportation of hops, soap, paper, &c.

By the *ft. 7 Geo. 20. f. 10.* the merchant shall be entitled to his drawback, if he ship his goods in three years.

By the *ft. 3 Geo. 7. f. 40.* all drawbacks on any goods shall continue till the duties cease.

But by the *ft. 4 & 5 W. & M. 15. f. 13.* no debenture of drawback shall be admitted but on oath by the real exporter, as interested in the propriety and hazard of the goods exported, or acting by commission is concerned in the direction of the voyage, so as to be able to judge that the goods are really and *bonâ fide* exported, and not re-landed or intended to be re-landed.

By the *ft. 6 & 7 W. 3. 18. f. 12.* oath on exportation of glass, stone, and earthen wares shall be, that the duties were truly paid or secured; and security shall be given, that they shall not be re-landed before the customer or comptroller of the port.

By the *ft. 7 W. 3. 10. f. 5.* on exportation of tobacco the debenture shall be on parchment, and the oath printed thereon *in hac verba*, signed and sworn by the exporter, that all the tobacco there certified is really exported beyond the seas on his own account, or on account of *A.* for whom he acted by commission, and is not landed, nor intended to be re-landed in *England*.

And by the *ft. 8 Ann. 13. f. 16.* exporter, or other concerned in re-landing, &c. forfeits double the value of the drawback, and the boats, horses, &c. used in it.

And by *f. 18.* no debenture shall be allowed on exportation of tobacco for *Ireland*, till certificate, &c. of landing there.

(So, by the *ft. 5 Geo. 11. f. 5.* on exportation of any goods for *Ireland*.)

Nor, by *f. 20.* on exportation of any tobacco in ships under twenty ton.

So, by the *ft. 6 Geo. 21. f. 49.* if tobacco, entred as exported for foreign parts, shall be landed in *Ireland*, double the drawback shall be forfeited, and the debenture for the drawback shall become void.

[No drawback is due for pepper, unless exported within the year, or prevented by accident. *Coske v. Attorney-General, M. 11 W. 3. Parker, 266.*]

[If the property is changed after shipping for exportation, the drawback is lost. *Cooke v. Attorney-General, M. 11 W. 3. Parker, 266.*]

[Salt shipped for or landed in *Scotland* does not discharge debenture. *R. v. Orpheur, H. 13 W. 3. Parker, 269.*]

(C 5.) Aulnage.

By the *stat. de Prov. 27 Ed. 3. 4.* is granted to the king for every cloth to be sold, above the customs due, a subsidy; viz. for every cloth of assise not in grain, 4*d.*; half in grain, 5*d.*; of scarlet, 6*d.*; of every half such cloth, half so much; but nothing for cloth less than an half cloth, or made for the use of him and his family, or, if sold again, when it hath once paid.

And the *aulnager* shall take for his fee of the seller for every cloth of assise a halfpenny, for every half cloth a farthing, and no more.

The *aulnager* is an officer appointed to measure by the *aulne*, or ell, all cloths, and collect the duties for the cloths so measured. *Nom. verb. Alnage.*

This statute gives the first duty of *aulnage* upon cloths. *Hard. 206. Semb. cont. Hard. 214.*

By the *stat. 11 H. 4. 6.* the *aulnager* shall have a new seal, and set it, after search and survey, to all cloths and dozens.

And by the several statutes. *17 R. 2. 2. 1 H. 4. 13. 9 H. 4. 2. 11 H. 4. 6. 11 H. 6. 9. 1 R. 3. 8. 4 Ed. 4. 1. 8 Ed. 4. 1. and 8 El. 2.* several regulations are made with respect to the measure and sealing of cloths, and the appointment, office, and duty of *aulnager*.

By these statutes the duty of *aulnage* shall be paid for new cloths made of wool, tho' not named in any of the statutes. *R. Hard. 205. 215.*

(C 6.) Search and Seizure of Goods forfeited, and Proceedings afterwards.

By the *stat. 12 Car. 2. 19.* (made perpetual by *3 G. 7.*) if any cause goods to be conveyed away before entry made, and the customer, &c. agreed with, on oath before the lord treasurer, any of the barons, or chief magistrate of the place where the offence was committed, or next adjoining, the said lord treasurer, baron, &c. may issue a warrant to any, with the assistance of the sheriff, justice of peace, or constable, to enter the house where the goods are suspected to be, who may enter in the day within a month after the offence; and, in case of resistance, break open the house, and seize the goods concealed.

But by this statute, if the information, on which the house is searched, proves false, the party grieved may in trespass recover his damages and costs.

[On an action against an officer for a seizure, probable cause is no defence; he seizes at his peril. *Leglise v Champante, M. 2 Geo. 2. Str. 820.*]

[Officer informing, and with warrant from commissioners of excise or justice of peace, entering house, is liable to trespass if he finds nothing. *Bostock v. Saunders, T. 13 Geo. 3. 3 Wils. 434.*]

[Whether commissioner or justice granting warrant is liable to action, if good ground of suspicion is not laid before him. *2. De Grey C. J. Semb. cont. Gould J. and Blackstone J. Semb. pro.* The words of the act are, if he shall judge it reasonable. *Ibid.*]

[Officer informing, and with writ of assistance entering house, if he finds nothing, is a trespasser *ab initio*. *Anon. 3 Wils. 437.*]

[On a writ of assistance, if the officer enters without a constable, he is a trespasser, tho' he finds uncustomed goods; and, if in a town or county of itself, the constable must be of the town, not of the county at large. *Anon. 3 Wils. 63.*]

After seizure for any cause, the officer shall transmit an account thereof to the solicitor of the customs in London, who shall enter it in his book, and, by a clerk in the remembrancer's office, shall have a writ of appraisement directed to the sworn appraisers in the port of London,

London, or, if the seizure be elsewhere, to the collector, &c. of the port where the seizure was, or other persons near, to make an appraisement. *M. P. Ex.* 139. 216.

The appraisement shall be made by two or more upon oath. *M. P. Ex.* 140. 218.

Afterwards, the writ shall be returned with an indenture annexed, containing the name of the seisor, and the time and quantity of the goods seized, which, being registered by the register of seizures in the port of *London*, shall be returned to the office out of which the writ issued, and the goods shall be proclaimed in court. *M. P. Ex.* 140. 248.

In the mean time an information shall be filed, having the same day, with the writ of appraisement, at the suit of the officer who seizes, and being signed by a baron, shall be inrolled with the writ, indenture, and proclamation. *M. P. Ex.* 141.

[Regularly, the writ of appraisement and delivery cannot issue till the information is in; but by consent it may issue in the vacation, defendant giving security; and when the information comes in, the court may order a new writ, and the old appraised value to be returned on it. *Scott v. Caswall*, in *Sc. M.* 1718, *Bunb.* 27.]

[If goods are appraised too high, the court may grant a new writ of appraisement. *Evans v. —*, in *Sc. M.* 1718, *Bunb.* 49. *Allen v. —*, *H.* 1724, *Bunb.* 185.]

[If goods condemned are bought, and afterwards seized, the condemnation cannot be given in evidence, but must be pleaded. *Per two Barons, contra one. Carter v. Saywell*, in *Sc. M.* 1721, *Bunb.* 52.]

[But if the goods have been sold by the purchaser to a third person, he may give parol evidence of their being condemned goods.]

[On information of seizure of *British* and foreign coins, no need of writ of appraisement or second proclamation; judgment may be for the coins themselves. *Attorney-General v. Lade*, *H.* 3 P. 19 Geo. 2. *Parker*, 57.]

If no claim be entred within eight days, if the seizure was in the port of *London*, if in another port within 14 days, after the proclamation made, and a rule for it entred upon the indenture, the goods are condemned, and the seisor shall make a *debet*, and thereupon pay a moiety of the appraised value into the *Exchequer*, whereupon the goods shall be delivered to him by order of the commissioners of the customs. *M. P. Ex.* 141. 143.

[Claim, before writ of appraisement returned, must be entred in the book in the office; but if after the return, it must be indorsed on the writ.]

[Since 8 *Ann.* the court will not make the claimant, tho' in low circumstances, swear to his claim, tho' of 10,000*l.* value. *Attorney-General v. Mellish*, in *Sc. H.* 1717, *Bunb.* 21. *Allen v. Cooper*, in *Sc. M.* 1718, *Bunb.* 21.]

[If the goods in one seizure by two officers are appraised and condemned by two writs, and the goods not particularly described, and no information, so no condemnation on the roll; tho' the goods are sold, and the moieties paid to the crown and the officer, the court will set aside the condemnation, and order an attachment against the officers. *Harwood v. Faulke*, in *Sc. M.* 1721, *Bunb.* 89.]

[Tea

[Tea was seized, and part carried away then, and the rest sealed down and carried away afterwards, and on this two writs of appraisement, and two informations; which were not set aside, the court being divided. *Warwick v. Rawlins*, H. 1721, *Bunb.* 96.]

If upon proclamation any one offers more than the appraised value, his name shall be recorded upon the indenture, and charged with the sum offered; and if there be no claim, he shall have a writ of delivery signed by a baron, paying a moiety into the *Exchequer*, and a moiety of the appraisement, and the sum advanced, to the seizer. *M. P. Ex.* 142.

[On seizure, information should be filed, then writ of appraisement taken out; on the return, defendant enters his claim, and may move for writ of delivery; if prosecutor delays filing information, or suing writ of appraisement, defendant, on entering his claim, may move for a writ of delivery; no certain rule as to delay; but if seizure in vacation, and no information filed next term, if it could have been tried that term, it is ground for a writ of delivery. *Johnson v. Sowers*, in *Sc. M.* 1718, *Bunb.* 30.]

[A bidder shall not be discharged, tho' goods sink in value, pending a claim put in after the bidding; and the court may order execution by *fi. fa.* against him, and not accept of the forfeiture of the bidding-money. Regularly, the process of the pipe should issue. *Sewell v. Johnson*, T. 1721; *Leaper v. Bound*, M. 1721, in *Sc. Bunb.* 76.]

[If the bidder has been at expence, the court will not rate the fine, tho' a composition be made by licence between the officer and the claimer. *Crawford's case*, H. 1721, *Bunb.* 100.]

[In rating the fine, the court will inquire if there is any bidder, and take his interest into consideration. *Crawford v. Hyam*, T. 1722, *Bunb.* 116.]

[It is discretionary in the court to grant a writ of delivery or not; and they will not for tobacco stalks, tho' wetted at sea. *Vincent v. De Laar*, T. 31 Geo. 2. *Parker*, 196.]

[The court refused a writ of delivery for a ship seized 10 days before, tho' loaded with perishable commodities, on a suspicion it was going to *Gottenburgh*. *Parker v. Aston*, H. 1717, *Bunb.* 21.]

[Removing goods from one port to another, without a permit, is an unlawful importation, and not within the jurisdiction of the excise; and if such goods are seized by their officer, on an information before them, the court of *Exchequer* will grant a writ of delivery. *Warwick v. White*, P. 1722, *Bunb.* 106.]

[If the witnesses for informer are at great distance, old and infirm; and unable to travel in winter, it is good ground to deny writ of delivery of goods for delay of prosecution on 14 G. 2. c. 11. *Kemp v. Laskey*, P. 22 Geo. 2. *Parker*, 92.]

[On seizure of perishable goods, court has power to order sale without consent of claimer. *Foster qui, &c. v. Cockburn*, P. 19 G. 2. *Parker*, 70.]

[But pending error, not. *Ibid.*]

[Or, if it does not clearly appear that the goods are perishable. *Ibid.*]

[Watches are perishable goods. *Gatehouse v. Reith*, in *Sc. P.* 1721, *Bunb.* 74.]

[The

[The party may proceed in the *Exchequer*, or before the justices; and if there is no delay in them, the court will not interfere. *Gregory v. Hunt*, M. 1723, *Bunb.* 139.]

[Justices of peace have jurisdiction of seizure of brandy, wherever it is; but of the waggon and horses, only if they are running goods from the water-side. *Rex v. Hollingsby*, P. 1723, *Bunb.* 130.]

[On an information *qui tam*, for importing brandies in unsizable casks, the court ordered they should pay duties, tho' the statute says they shall be forfeited. *Doe v. Cooper*, P. 1719, *Bunb.* 44.]

[On information for running goods, filed, but not entered in the book, *capias* may issue as the first process. *Attorney-General v. Randall*, H. 1725, *Bunb.* 209.]

[There is no right to seize contraband goods, unless they are landed or offered to sale; mere bringing the ship into port gives no right to seize. *Smyth v. Reynolds*, P. 5 Geo. 3. 2 *Wils.* 257.]

[If goods prohibited from being sold in this country by *st.* 11 & 12 *Will.* 3. c. 10. are taken out of a warehouse, and put on board a vessel as if for exportation, but in fact with a view to be re-landed, they are liable to be seized, tho' no attempt has been made to re-land them. *Wilson v. Saunders*, C. P. E. 38 Geo. 3. 1 *Bos. & Pull. Rep.* 267.]

[If a custom-house officer seizes goods, exhibits information, and proceeds to condemnation, the right of action (enacted to be brought in a month for a pecuniary penalty) attaches in him, and no other can bring the action till a month from the condemnation. *Trott v. Wells*, M. 3 Geo. 3. 3 *B. M.* 1357.]

[Attorney-General (as well as officer) has costs by 8 *Ann.* c. 7. where judgment for the king. *Attorney-General v. Munn*, H. 22 G. 2. *Parker*, 91.]

[On information for the king and the party, defendant is not entitled to judgment; as, in case of a nonsuit in an action on 14 *Geo.* 2. c. 17. *Kemp v. Laskey*, P. 22 *Geo.* 2. *Parker*, 92.]

[An officer may sue *qui tam*, &c. tho' he has no right to any part of the forfeiture or benefit from it.]

[*A fortiori*, if he is to have a collateral reward.]

[In such case judgment for the king alone. *Malden v. Bartlett*, M. 24 *Geo.* 2. *Parker*, 105.]

[Information for penalty abates by defendant's death after trial, and before judgment, and this may be suggested on the roll, and confessed by attorney-general to save writ of error. *Attorney-General v. Buckley*, H. 10 & 11 *W.* 3. *Parker*, 264.]

[The court stopped an action, because defendant would not admit the seizure, which the officer could not prove, tho' two terms had passed before the information filed. *Tanner v. Alfried*, in *Sc. H.* 1718; *Bunb.* 37.]

[If a seizure is made by a proper officer, and a condemnation in the *Exchequer*, B. R. will not examine the property on an action of trover; but if by a stranger, it will. *Horne v. Boosey*, T. 6 *Geo.* 2. *Str.* 952.]

[An enemy's ship with prohibited goods may be seized by custom-house officer, tho' already seized as a perquisite of the Admiralty; and prohibition shall go against Admiralty. *Score v. Ld. Admiral*, P. 8 *Ann.* *Parker*, 273.]

[Prohibited

[Prohibited goods (as *French* wines in time of *French* war) bought with the king's money, and imported for the use of his family, are not forfeited. *Bruse v. Harcourt, Attorney-General, T. 8 Ann. Parker, 274.*]

[On information of seizure, it is not necessary to set forth the quantity nor kind (because they are made certain by the writ of appraisement); but in information of *devenerunt* it is necessary, and for want thereof judgment shall be arrested. *Nat v. Bartlett, M. 9 Ann. Parker, 278.*]

[Where there is a penalty which may be sued for by a common informer within a year, attorney-general may file information for discovery, waiving penalties, after the year, but not before; if he doth, defendant may demur. *Attorney-General v. Cresner, M. 9 Ann. Parker, 279.*]

[By *stat. 3 G. 3. c. 22.* all ships and goods (except those liable to be burned) seized by officers of customs, shall be sold to the best bidder, and the price go half to the officer, half to the king.]

[Any vessel not above 50 tons, having foreign spirits, (except two gallons a-head for the crew,) or tea or tobacco, on board, in any harbour, or hovering within two leagues of shore, is forfeited, and shall be burned, or used in the king's service.]

[By *stat. 5 G. 3. c. 43.* goods paying duty *ad valorem*, under-rated, may be carried by officer to the king's warehouse, the collector to pay the value sworn to, and 10 s. *per cwt.* addition, and the duties paid to the proprietor; the goods to be sold, the money advanced to be replaced, and the surplus paid, half to the officer, half to the sinking fund.]

[By *stat. 9 G. 3. c. 6.* excise officers may seize horses and carriages used in smuggling foreign spirits.]

(D) Restraint of Trade.

(D 1.) By the King's Charter.

THE king by his charter cannot make a total restraint of trade, for such a patent will be void. 3 *Mod.* 132. *Vide ante* (B).

Tho' it relates only to pastime or recreation, &c. 11 *Co.* 87. b. *Vide in Prerogative, (D 36.)*

Tho' it be the trade of a merchant, or a mechanic trade. 1 *Rol.* 4.

And therefore the king, by his patent, cannot restrain any, that he shall not trade by sea. 1 *Rol.* 4.

Nor, can he grant to an abbot, that he alone shall have such a port. 1 *Rol.* 5.

So, the king, by his charter, cannot make a grant, that none shall use his trade within such a town, unless he be free of the same town. R. 8 *Co.* 125. a. *Adm. Lut.* 564. *Vide in By-Law, (B 3.)*

That none practise physic without a licence from the college of physicians, unless it was confirmed by parliament. *Per two J.* 1 *Rol.* 5. *Vide in Physicians (A).*

That all sweet wines imported into *England* be landed at *Southampton*, and not elsewhere. 2 *Rol.* 114.

That all merchandizes imported into such a city be left at the *Guildhall* there for 40 days. 2 *Rol.* 113, &c.

That

That none shall use a trade, unless he be a member of such a corporation. *Dub. Hard.* 55.

So, the king, by his charter, cannot grant that such a corporation, &c. shall use a trade at such a place, exclusive of all others not free of the same corporation. *Dub. 3 Mod.* 127. *R. Hard.* 108, 9. *Dub. Comb.* 53. *R. Skin.* 361.

Or, that such and such deal in such and such commodities, exclusive of others. *2 Rol.* 174. l. 45. *Vide post.* (D 4.)

That *A.* shall have the sole printing of bonds, &c. which others printed before. *Semb. 3 Mod.* 77.

That only 100 persons shall trade there. *1 Rol.* 4.

That the master, wardens, and fraternity of *Trinity Isle* in *Ireland* shall have the sole buying and selling of merchandizes imported into the city of *Dublin*. *2 Rol.* 113.

That if any trade to the *Canaries*, without leave of such and such persons, his ship and goods shall be forfeited. *R. 1 Sid.* 441. *1 Mod.* 18. *1 Vent.* 47.

That a corporation shall have the sole trade to the *East Indies*, tho' it be a country of infidels. *R. cont. 3 Mod.* 127. *Skin.* 132. 165. 197. 223. *Vide infra.*

So, the king, by his charter, cannot make a monopoly. *Vide post.* (D 4.)

But where a place for trade is discovered, with the great peril of any persons, the king may grant to them the sole trade there; as, the trade to *Greenland*. *Adm. 1 Rol.* 5.

The trade to the *East Indies*, to the *East India Company* only. *D. 2 Rol.* 115. *Semb. 1 Ver.* 130. 307. *2 Ca. Ch.* 165. *R. cont.* as it seems. *Skin.* 334. 361. *R. acc.* 36 & 37 *Car.* 2. *Skin.* 132. 165. 197. 223. *3 Mod.* 127.

[The *st.* 9 & 10 *Will.* 3. c. 44. in consideration of a large sum of money advanced by the *East India Company* gave them the exclusive right of trading there, subject to a redemption on the part of the public by repaying the money advanced, and giving three years' notice. Several acts of parliament, in the reigns of *Queen Anne*, *George the Second*, and in the present reign, have confirmed and continued this exclusive right of trading, which has never yet been put an end to. The *st.* 33 *G.* 3. c. 52. has brought together in one code almost all the statutes respecting the *East India Company*. This last statute has repealed such parts of the statute of *William* as inflicted penalties, &c.; and says, that no acts or parts of acts thereby repealed shall be pleaded or set up in bar of any action, &c.; yet it is competent to underwriters who have subscribed policies on ships trading to the *East Indies*, in contravention of the statute of *William*, to avail themselves of the illegality of such trading in an action brought on the policies. *Camden v. Anderson*, *B. R. T.* 36 *Geo.* 3. 6 *T. R.* 723. *Exchequer-Chamber*, *E.* 38 *Geo.* 3. 1 *Bos. & Pull. Rep.* 272.]

[Under the late treaty between this country and the United States of *America*, referred to in *st.* 37 *Geo.* 3. c. 97. it is not necessary that the trade from *America* to our settlements in the *East Indies* should be direct; it may be carried on circuitously by the way of *Europe*. *Wilson v. Marryat*, *B. R. M.* 39 *G.* 3. 8 *T. R.* 31. *Marryat v. Wilson*, *Ex. Ch.* *E.* 39 *G.* 3. 1 *Bos. & Pull. Rep.* 430.]

So,

So, the king, by his charter, cannot impose the forfeiture of goods, upon pretence of a regulation of trade. 1 *Ver.* 307. *Semb.* 1 *Vent.* 47. *Vide Prærogative*, (D 38.)

So, he cannot inhibit the importation of goods, except at such a port. 2 *Inst.* 61.

[*Chancery* will never establish a right claimed under a charter from the crown, till there has been an action at law to try the right. *Blanchard v. Hill*, *M.* 1742, 2 *Atkyns*, 484.]

(D 2.) By By-Law or Custom.

So, a by-law for the total restraint of trade will be void. *Vide By-Law*, (C 3.)

So, a custom which makes a total restraint of trade will be void; as, a custom that he shall not use a trade in such a city, &c. unless it be founded upon some consideration. *Mo.* 342. *Sti.* 111. *R.* 2 *Lev.* 210. *R.* 3 *Lev.* 241.

So, a by-law, that he shall not use the trade of a taylor, &c. without licence, &c. does not extend to him who makes vestments for *A.* and his family, as a servant in his house. *R.* 1 *Roll.* 4.

But a custom, which restrains trade *sub modo*, may be good; and therefore, the custom of *foreign bought*, and *foreign sold*, whereby a man, not free of a city, &c. will be restrained from buying or selling goods to other foreigners within such city, &c. is good. *Dy.* 279. *b.* *R.* *Jon.* 162. *Adm.* 2 *Roll.* 202. *l.* 45.

A custom that none shall use a trade there, unless he be free of the guild. *R.* in *London*, 8 *Co.* 125. *Dub.* whether good in another city. 1 *Sal.* 204. *Mod. Ca.* 21. *Vide By-Law*, (B 3.—C 3.)

So, a custom that none shall use the trade of a dyer in such a town, without the licence of the archbishop, will be good. 8 *Co.* 125.

So, a prescription, that none in the *vill* of *D.* who holds of the manor of *D.*, shall bake elsewhere than at such a bakehouse in the same town, will be good. *Ow.* 67. *cont.* But it is said that the same case was *R. acc.* 8 *Co.* 125. *b.* *Cro. El.* 203. 1 *Leo.* 142.

A custom that a butcher do not sell flesh in his own house upon a market-day in a town where the prior has a market, but must sell upon a stall in the open market. 8 *Co.* 127. *a.*

(D 3.) By Contract.

So, if a man, for good consideration, restrains himself from the exercise of his trade in a particular place, he shall be bound by it; as, if a man, in consideration that the plaintiff would buy all the goods in his shop, promises that he will not afterwards use his trade in the same shop. *R.* *Al.* 67. *R.* *Noy*, 98. *R.* 2 *Roll.* 201.

Or, that he will not use his trade afterwards in the same street in *London*. *R.* 2 *Cro.* 597. *Per Roll*, *Sti.* 311.

So, in consideration that the plaintiff bought his decayed wares at the first price, he will not use his trade afterwards in the same town in the country. *R.* *per three J. and aff. in Error*, 2 *Cro.* 596. 1 *Roll.* 16. *l.* 50. *Jon.* 13. 2 *Roll.* 201.

So, in consideration that the plaintiff had married his daughter. *R.* *and aff. in Error*, 1 *Roll.* 17. *l.* 67. *Sti.* 111.

So,

So, in consideration that he took his house for 21 years, that the defendant will not suffer the same trade in the next shop during the term, is good. 2 Cro. 326. 2 Bul. 136.

So, bond, with condition not to set up trade within half a mile of plaintiff's dwelling-house, or any other that she, or her executors or administrators, shall remove to, to carry on trade of a linen-draper, nor to instruct or assist any other, good; on consideration that plaintiff had taken defendant to instruct and maintain without money. *Cheefman v. Ranby*, H. 13 G. Fort. 297. S. C. *Cheefman v. Nainby*, affirmed on error in B. R. and in parliament; the twelve judges attending, and unanimous. Str. 739. Ld. Raym. 1456.]

[So, articles not to set up the trade taught, within the bills of mortality, on penalty of 44 l., good. *Clerke v. Comer*, T. 7 G. 2. B. R. H. 53.]

But a promise or obligation, which binds any to a total restraint of his trade, is unlawful and void. Adm. 2 Cro. 596.

As, an obligation that he will not afterwards use the trade of a dyer. 2 H. 5. 5.

So, an obligation that he will not buy sheeps-trotters of any person, with whom the obligee deals or shall deal, or of more persons than he buys of; for this may amount to a total restraint of his trade. R. in B. R. T. 1 W. & M. inter *Thompson and Harvey*, Sho. 2.

So, an obligation on promise, which restrains the total use of his trade for four years, will be void.

Tho' it be only in three counties. Ow. 143.

Or, that he shall not use his trade for four years in *Nottingham*. R. Mo. 115. Al. 67. R. Ow. 143.

So, an obligation or promise, which restrains the total use of a trade in a particular place, is void, unless it appears to be made upon good consideration. Per Holt, inter *Thompson and Harvey*, Sho. 2. R. 2 Leo. 210. Mo. 242. 3 Lev. 242. [1 P. Wms. 181.]

So, if it restrains the total use of trade, tho' it be upon consideration. Al. 67. [1 P. Wms. 181.]

[B. gave a bond to A. that he would not practise as a surgeon on his own account for fourteen years within ten miles of a certain place, in consideration that A. would take him as an assistant in his business as a surgeon for so long a time as it should please A.; and the bond was holden good in law. *Davis v. Mason*, B. R. H. 33 Geo. 3. 5 T. R. 118.]

(D 4.) Monopoly.

By st. 38 Ed. 3. a merchant may freely deal in all manner of merchandize, notwithstanding any charter. 2 Rol. 174. l. 45. 50.

And therefore, every grant of the king, which tends to a monopoly, will be void by the common law. 1 Rol. 4.

A monopoly is, when the sale of any merchandize or commodity is restrained to one or a certain number. 11 Co. 86. b.

And has three inseparable consequents; the increase of the price, the badness of the wares, the impoverishment of others. *Ibid.*

And therefore, every grant which tends to a monopoly, will be void; as, if the king grants to A. the sole making of cards, &c. for 21 years. R. 11 Co. 86. 8 Co. 125. a.

On the sole making of ordnance for battery in the time of war. Godb. 254. That

That he alone shall carry *kerfyes* out of the kingdom: *Godb. 254.*

Or, shall have the sole importation of cards into the kingdom.
R. 11 Co. 88.

That goods shall not be imported, but at such a port. *2 Inst. 61.*

So, by the *st. 21 Jac. 2.* all monopolies, and all commissions, grants, licences, letters patent, &c. to any person, body politic, &c. for any sole buying, selling, making, working, using of any thing, &c. shall be void.

And any grieved, &c. may have an action on the statute in *B. R.*, *C. B.*, or *Exchequer*, and recover treble damages and double costs.

So, all monopolies are contrary to *magna charta.* *2 Inst. 63.*

But by a proviso in the *st. 21 Jac. 2.* it shall not extend to letters patent, &c. heretofore made for 21 years, or hereafter to be made for 14 years, for the sole working or making of any new manufacture, to the first inventor, &c. so as not contrary to law, or mischievous to the state, or generally inconvenient.

And, any grant to a city or corporation, or to any company, &c. of art, occupation, mystery, &c. for the maintenance or ordering of trade; and letters patent made or to be made about printing, making of gunpowder, ordnance, shot, or of any office not decried by proclamation, shall be of the same effect, and no other, as if this act had not been made.

And this act shall not extend to letters patent, grant, &c. about allom, or allom mines, or to the fellowship of hoastmen at *Newcastle*, about selling, &c. sea-coal or pit-coal, &c. or to licences for keeping taverns or selling wines, or the patent to *Sir Robert Mansell* about making glafs, or to *Abraham Baker* about smalt, or *Lord Dudley* about cast-works.

So, there may be letters patent for 14 years to the first user within the kingdom, tho' he did not invent, but discovered it in foreign parts.

Per two J. Sal. 447.

Vide ante (B).

[*Chancery* governs itself by this rule, whether there is any act of parliament on which the restriction is founded. *Blanchard v. Hill, M. 1742, 2 Atkyns, 484.*]

[Authors (and those claiming under them) have property in their books, after publication, in perpetuity; and they only have a right to multiply copies for sale, and may maintain action against any. This is a common-law right, not taken away by *st. 8 Ann. c. 19.* *Per Mansfield C. J. Aston J. and Willes J. contra Yates J. Millar v. Taylor, P. 9 G. 3. 4 B. M. 2303.*]

* [Writ of error was brought; but plaintiff, after assigning errors, suffered himself to be non-prossed, and injunction in *Chancery* was granted.]

[The same doctrine was confirmed by decree in *Chancery.* *Becket v. Donaldson.*]

[But on appeal to the House of Lords, this decree was reversed; the doctrine now established is,

[That authors or their assigns have not the sole and exclusive copy-right in perpetuity after having published their compositions; but by *st. 8 Ann. c. 19.* have it for fourteen years from the publication, and then the right returns to the authors (if living) for other fourteen years.]

[N. B.]

[N. B. Previous to this judgment, the opinions of the judges were taken, and were as follows:

Five judges, viz. *Smythe C. B. Aſton J. Willes J. Blackſtone J. and Aſhburſt J.* delivered their opinions:

1. That at common law an author had the ſole right of firſt publiſhing, and might bring action againſt any who did it without his conſent; 2. That the law did not take away ſuch right on his publiſhing, and that no perſon might then do it without his conſent; 3. But the author and his aſſigns had the ſole right in perpetuity; 4. And that this action at common law is not taken away; 5. Nor this right any way impeached, reſtrained, or taken away by *ſtat. 8 Ann.*

With theſe five (it is ſaid) Lord *Mansfield* was known to concur (tho' he did not ſpeak, it being very unuſual, from reaſons of delicacy, for a peer to ſupport his own judgment on an appeal to the Houſe of Lords). It may therefore be ſaid, there were ſix of the twelve judges unanimous on all theſe points.

Two judges, viz. *Gould J. and Nares J.* were of the ſame opinion on the 1ſt, 2d, and 4th points, as to the common-law right.

One judge, viz. *De Grey C. J.* was of the ſame opinion on the firſt point.

Two judges, viz. *Adams B. and Perrott B.* were of opinion on the firſt point, that the author had the ſole right of firſt publiſhing, but could not bring action againſt any but ſuch as had obtained the copy by fraud or violence.

One judge, viz. *Eyre B.* was of a contrary opinion on this 1ſt point, viz. that the author had no right even before publiſhing, and in all the reſt.

Four, viz. *De Grey C. J. Adams B. Perrott B. and Eyre B.* were of a contrary opinion on the 2d and 4th points, viz. that publiſhing took away the right.

And ſix, viz. *De Grey C. J. Adams B. Gould J. Perrott B. Nares J. and Eyre B.* were of a contrary opinion on the 3d and 5th points, viz. that the common-law right was taken away by *8 Ann.*

[So, that of theſe ſix, only two concurred with each other on all the five points, viz. *Nares J. and Gould J.* on one ſyſtem, and *Adams B. and Perrott B.* on another, and the opinions of the ſix were diverſified ſix ſeveral ways.]

[An author, whoſe work is pirated before the expiration of twenty-eight years from the firſt publication of it, may maintain an action on the caſe for damages againſt the offending party, altho' the work was not entred at *Stationers' Hall*, and altho' it was firſt publiſhed without the name of the author aſſixed. *Beckford v. Hood, B.R. E. 38 Geo. 3. 7 T.R. 620.*]

[By *ſtat. 15 G. 3. c. 53.* the univerſities in *England* and *Scotland*, and *Eton, Weſtmiſter, and Wincheſter* colleges, may hold in perpetuity their copy-right in books given or bequeathed to them.]

[The proprietor of a print, to entitle himſelf to the benefit of *ſtat. 8 Geo. 2. c. 13.* muſt engrave and print his name, and the day of firſt publication, on it. *Sayer v. Dicey, P. 10 G. 3. 3 Wilſ. 60.*]

[By *ſtat. 17 G. 3. c. 57.* proprietors of prints may bring action on

the case, and recover damages and double costs, against persons copying their prints in the whole or in part, by varying, adding, or diminishing, without consent.]

[In an action on this statute by the proprietors, against the pirater of a print, it is not necessary to produce the plate in evidence; one of the prints taken from it is sufficient. *Thompson v. Symonds*, B. R. M. 33 Geo. 3. 5 T. R. 41.]

[A patent was granted to *A. B.* for a *new-invented method* of using an old engine in a more beneficial manner than was before known. The specification stated, that the *method* consisted of certain *principles*, and described the mode of applying those principles to the purposes of the invention, and an act of parliament, reciting the patent to have been for the making and vending *certain engines* by him invented, extended to *A. B.* for a longer term than 14 years the privilege of *making, constructing, and selling the said engines*. *Qu.* Whether, under these circumstances, the patent right was valid? *Boulton v. Bull*, C. P. E. 35 Geo. 3. 2 H. Bl. 463. *Hornblower v. Boulton*, B. R. H. 39 Geo. 3. 8 T. R. 95. determined the patent-right to be valid.]

[*Vide Patent (E).*]

(D 5.) Restraint by Statute.

[Acts of parliament, relating to trade in general, are public acts; but an act which relates to a certain trade only, is a private one. 1 *Term Rep.* 125.]

(D 5.) *If he have not served as an apprentice.*] So, by the *st. 5 Eliz. 4.* none shall use a manual occupation, &c. not then used by him, but then used within the realm, unless he shall be brought up therein seven years, as an apprentice, nor set any to work in such occupation, unless he have been an apprentice, &c. on pain to lose for every default 40 s. for every month.

[*Who are within the statute.*] This stat. against exercising trades, without serving apprenticeship, extends to parishes as well as corporations. *Ball v. Cobus*, T. 30 & 31 G. 2. 1 B. M. 366.]

And this statute restrains the use of any trade without being an apprentice for seven years, which was then used, or is mentioned in the statute. 8 Co. 129. b. *Sal.* 611.

As, a draper. *Hard.* 54. 2 *Keb.* 403. *R. Sti.* 223.

Ironmonger. *R. Cro. Car.* 316.

Soap-maker. *Hard.* 54.

Knife-haft-maker. *Ibid.*

Brewer. *R.* 8 Co. 129. b. 2 *Cro.* 178. 1 *Rol.* 10. *Dub.* 2 *Bul.* 190. *R.* if it be in London. *Pal.* 543.

Baker. *R. Mo.* 886. *Hob.* 183. 2 *Rol.* 376.

Taylor. *D.* 1 *Lev.* 243.

Upholsterer. *Dub.* 1 *Rol.* 10. 2 *Bul.* 191. *R.* 1 *Lev.* 243. *Sal.* 611.

Point-maker. *Cro. Car.* 516.

Spurrier. *R.* 2 *Cro.* 179.

Tiler. 4 *Mod.* 145.

Fell-monger. *Sal.* 611.

Barber. *R.* 1 *Lev.* 87. 2 *Lev.* 206.

Cook. 8 Co. 129. b.

[Indictment

[Indictment on this statute against a tanner needs not aver the want of other qualifications, which by *subsequent* statutes entitle persons to exercise that trade without apprenticeship; but such other qualification must be shewn by defendant, either by plea, or in evidence. *Rex v. Pemberton*, T. 33 & 34 G. 2. 2 B. M. 1035.]

And a person cannot use a trade within the restraint of the statute, to which he does not serve as an apprentice for seven years; tho' he be a freeman of the city of London. R. 1 Sand. 311.

Tho' he be an alien or denizen. R. Hut. 132.

Tho' he have served as an apprentice to another trade. R. Sho. 266. Cont. 4 Leo. 9. 2 Bul. 190.

Tho' she was a widow to a tradesman within the statute; for that does not make her an apprentice. Noy, 5. Except where she assisted her husband seven years. Carth. 163.

Tho' he served beyond sea for seven years, if he was not bound by indenture. Per Holt, in Surry, 10 W. 3. Sal. 67. The book seems cont.

Tho' he allege a custom to excuse him. Dub. Pal. 542.

[But a man may exercise as many trades as he has worked at, or served to, seven years. 2 Wilf. 168. 1 Bl. Rep. 233.]

So, a person, not apprentice for seven years, cannot employ others who have served seven years, in the exercising of the trade; for that is using of the trade. R. Sho. 241. 3 Mod. 315. Per three J. Dolb. cont. Sal. 610. Carth. 163.

[But one who advances a sum of money in a trade, and becomes a partner, but does not meddle in the manual exercise of it, is not within the statute 5 El.; tho' he never served any apprenticeship. 2 Wilf. 40. 1 Bul. 5.]

Nor, use the trade for himself. Per Holt, Carth. 163. Vide post. (D 6.)

[Where, by the constitution of a corporation, a person who has served a seven years' apprenticeship to a freeman residing in it, is entitled to his freedom; and where, by a by-law, the indentures must be inrolled by the town-clerk within a limited time, an apprentice, who is bound to a freeman resident only occasionally, and whose service is to be performed at another place, is not entitled to have his indentures inrolled, nor will B. R. grant a mandamus to the town-clerk for that purpose. 2 T. R. 2.]

[A single act of selling does not make a man a hawker, nor oblige him to have a licence. *Rex v. Little*, T. 31 G. 2. 1 B. M. 609.]

[One licence is sufficient for a person who travels with several horses, tho' the intention of the legislature was evidently otherwise; yet, by mistake the word *year* is put for *horse*, and the commissioners have always conformed to it. But note, B. R. would give no opinion thereon. *Rex v. Robotham*, P. 4 G. 3. 3 B. M. 1472.]

[The linen manufacture of Scotland is the linen manufacture of this kingdom; therefore native of Scotland, wholesale dealer in Scotch linens, is not obliged to take out a licence to carry his linen from town to town, and expose them to sale in a room by wholesale only. *Maxwell v. Meyer*, P. 2 G. 3. 3 B. M. 1314.]

[A journeyman is not liable to the penalty of 5 El. c. 4. *Beach v. Turner*, T. 9 G. 3. 4 B. M. 2449. Qu. Whether the master who employs him is not liable.]

[By 17 G. 3. c. 33. dyers in *Middlesex, Essex, Surry, and Kent*, may employ journeymen who have not served apprenticeships.]

[By 17 G. 3. c. 55. so may all hatters.]

[By *stat.* 18 G. 2. c. 33. carts in *London* may be drawn with three horses, and the wheels of six inches broad may be bound with iron, and the name of the owner shall be on every cart, on pain of 40s. on the driver.]

[By 29 G. 3. c. 26. s. 16, 17. no hawkers can expose goods to sale in any part of a market-town, but the public market-place. *Vide* 4 T. R. 273.]

(D 6.) *Who not.*] But the *st.* Eliz. 4. does not extend to employments which do not require skill; as, to a pippin-monger, or costermonger. R. 2 Bul. 190. 1 Rol. 10. *Dub.* Sal. 611. 1 Vent. 326. 346. 2 Lev. 206.

Or, a hemp-dresser, wool-comber. R. Cro. Car. 499. Sal. 611.

Gardener. 1 Vent. 326. 2 Bul. 191.

So, he is not within the statute, if he served seven years as an apprentice, tho' never bound by indenture. Sal. 613.

[Or, if he served part of the time as an apprentice, and the rest as a journeyman. 3 Keb. 400.

Or, served seven years out of the kingdom, if bound by indenture. R. 1 Sal. 67.

If a wife has assisted her husband in his trade seven years, she may use it after his death. Sho. 242.

[If any man, as a master, has exercised a trade without interruption for seven years, he is not liable to be sued on 5 Eliz. c. 4. *Per all the Judges, French v. Adams*, T. 3 G. 3. 2 Wils. 168.]

If the master, to whom the apprentice served, used such trade, tho' another trade was his principal; as, if a mercer sells hats, his apprentice shall use the trade of an hatter. Sho. 242.

So, it does not extend to him who uses a trade for his private family; as, if he has in his house any one who acts as a brewer, baker, taylor, &c. for his private use. R. 8 Co. 129. b. R. 11 Co. 54. a. Cro. Car. 499. Acc. Carth. 163.

So, the statute does not abrogate the particular custom of a town, &c.; as, that the widow of a trader shall use the trade of her husband, &c. Carth. 163.

(D 7.) *Remedy against the offender.*] By the *st.* 5 Eliz. 4. all penalties in that act, not otherwise disposed of, shall be, one moiety to the king, the other to such as will sue for the same in the queen's courts of record, or before justices of *oyer and terminer*, or any other justice, by action of debt, information, or otherwise; and the said justices, or any two, (one being of the *quorum*,) and mayors, &c. of corporations, may hear and determine all offences against the said statute, on an indictment in the sessions of the peace, or an information, &c.

Provided, all amerciaments, fines, forfeitures for any offences in this act, within a city or corporation, shall be levied, &c. by such person within the city, &c. as shall be appointed by the mayor, &c. to the use of the city, &c. in such manner as any other amerciaments, &c. have been used to be levied, &c. by reason of any grant or charter, &c. to the same city, &c. And

And therefore an indictment lies for using a trade contrary to the statute.

Or, debt, or information *qui tam*, &c. [*Vide Cowp.* 369.]

And an indictment or information lies in the sessions of the city, borough, &c. as well as of the county; tho' by the *st.* 31 *El.* 5. suits for using an art wherein not brought up, &c. shall be in the quarter sessions of the peace, or assizes of the county where the offence committed, or leet, &c.; for it is added, *and not elsewhere out of the said county.* *R.* 2 *Keb.* 403. *R.* *Sal.* 370. *Mod. Ca.* 220.

And an information *qui tam*, &c. lies, tho' the forfeiture be given to the corporation; for that only shall be intended of the king's part. *R.* *Cro. Car.* 316.

But debt does not lie upon this statute in the courts of *Westminster*, unless the offence was in *Middlesex*. *R.* *Hob.* 184. But *Mo.* 886. reports the same case *cont.* *Semb. acc. Sti.* 223. *Vide Action upon Statute (D).*

So, the indictment, &c. is not sufficient, if it does not allege that the trade was used, 5 *El.* *R. Pal.* 528. *Sal.* 611. *Semb. cont.*; for the court may take notice that it is an antient trade. 2 *Roll.* 376.

If it be a trade named in the *st.* 5 *El.* 4. it shall be intended then used, tho' not so alleged. 4 *Mod.* 145, 6.

Who may take or shall be bound apprentices, and how punished or discharged, *vide in Justices of Peace*, (B 53, &c.)

Vide more concerning Trade, in Action on the Case for Deceit, (A 7.)
—*By-Law*, (B 3.—C 3.)—*London*, (N 6, &c.)—*Merchant*.—*Navigation*, (I 1, &c.)—*Prerogative*, (D 38.)—*Scotland*, (D 7.)

TRANSPOSITION OF WORDS.

Vide Parols, (A 21.)

T R A V E R S E.

Vide Indictment (L).—*Justices of Peace*, (D 13.)—*Pleader*, (G 1, &c. 17, &c.)—*Prerogative*, (D 83, 84.)—*Sewers* (G).

T R E A S O N.

Vide Admiralty, (E 2.)—*Copyhold*, (M 1.)—*Forfeiture*, (B 1, 2, 3.)—*Justices*, (K 1, &c.—L 1, &c.—N 1.—X 1.—3 Y 4.)—*Justices of Peace*, (B 2.)—*Parliament*, (L 28.)—*Testmoigne*, (A 3.)—*Utlagary*, (D 1.)

TREASURE TROVE.

Vide Officer, (G 9.)—*Waife* (G).

T R E A S U R E R.

Lord High Treasurer.

Vide Courts, (D 8.)—*Justices*, (K 8.)—*Officer*, (E 1.)

Treasurer of a County.

Vide Justices of Peace, (B 70.)

T R E E S.

Vide Biens (H).—Copyhold, (K 7.)

T R E S P A S S.

(A) Trespass ; What shall be.

(A 1.) To Goods and Chattels.

TRESPASS is a wrong done to the person, to the goods and chattels, or to the lands and tenements of another man.

Trespass to the person may be by menace, assault, battery, or *mayhem*. Of which *vide in Battery (A—B—C—D—E)*.

Or, by false imprisonment. Of which *vide in Imprisonment, (L 2.)*

It will be a trespass done to another, if a man wrongfully takes the goods and chattels of another ; as, if he takes his horse, ox, or other cattle, or live chattel. *F. N. B. 87. M.*

[Trespass lies for assaulting, beating, and wounding plaintiff's mare. *Barnes, 452.*]

So, if he takes his furniture, or other dead chattel.

As it lies *de navi abductâ. F. N. B. 87. I.*

So, if he takes cattle or goods that belong or have relation to another thing ; as, it lies *de pullis espervor. suorum in tali bosco suo nidifican. F. N. B. 86. L.*

Of doves taken out of his dove-house. *F. N. B. 88. I.*

De leporibus, phasianis, perdicibus, cuniculis, &c. in warrenâ vel clauso suo captis et asportatis. F. N. B. 86. M. 87. A.

De feris in parco suo captis et asportatis. F. N. B. 87. A.

But this seems to be by the *st. W. 1. 20. 2 Rol. 550. l. 46.*

Of fish taken. *5 Co. 34. a. Playter.*

So, it lies *de uxore abductâ cum bonis viri. F. N. B. 89. O.*

Of a servant taken away, *cum bonis magistri. 2 Rol. 551. l. 34.*

So, it lies of charters taken, tho' they concern the freehold or inheritance.

Of a bond or other writing taken. *2 Rol. 557. l. 40.*

So, it lies of 100 shillings of his money *in pecunia numerata. F. N. B. 87. M.*

Of timber. *F. N. B. 87. D.*

So, *de catallis felon.* taken by the sheriff. *F. N. B. 91. F.*

Of goods wrecked taken before seizure. *F. N. B. 91. D.*

Of goods waived or strayed, before seizure. *F. N. B. 91. B.*

[So, working an estray, altho' the original taking was lawful. *Oxley v. Watts, B. R. M. 26 Geo. 3. 1 T. R. 12.*]

So, trespass lies for an unlawful distress of goods. *F. N. B. 90. B.*

For goods taken till he make fine, release, &c. *F. N. B. 87. C.*

For goods destroyed ; as, a mill-stone broken. *F. N. B. 88. L.*

• Sheep

Sheep driven by a dog, *ita quod deteriorat. sunt.* F. N. B. 89. L.

Hogs driven *ita quod interierunt.* F. N. B. 89. L.

Of hay or other goods burnt. F. N. B. 88. N.

Vestment spoiled by throwing wine upon it. R. Noy, 48.

(A 2.) To Lands and Tenements.

It will be a trespass, if a man wrongfully enters the house, lands, or tenements of another without his consent; and therefore trespass lies *de domo sua fracta.* F. N. B. 87. D.

For entering *messuagium sive tenementum.* *Vice v. Burton, H. 4 G. 2. Str. 891.*

De clauso suo fracto. F. N. B. 88. K. 91. I.

So, a trespass may be to lands or tenements by entry into his possession. F. N. B. 92. A. B. 2 Rol. 555. X.

By treading down, spoiling, eating, &c. his hay or corn. F. N. B. 87. G. 88. K.

By cutting down trees, &c. F. N. B. 87. G.

By hunting in his close. F. N. B. 87. A.

By breaking ditches or hedges. F. N. B. 90. K.

By throwing down or disturbing the setting up of his fold. F. N. B. 91. H.

By breaking up a pond. F. N. B. 87. L.

So, if a man enters and does damage to another, tho' he does not keep the possession; as, trespass lies *quare domum vel clausum fregit.*

So, trespass lies for a wrong to lands contrary to a trust reposed in him; as, if a lessee at will cuts down timber, or commits voluntary waste. Co. L. 57. a. R. Sav. 84.

So, trespass lies for a wrong to his liberty or privilege in land; as, *quare warrennam ipsius A. intravit, & sine licentia fugavit, et lepores, cuniculos, phasianos, seu perdices cepit et asportavit.* F. N. B. 86. M.

Quod separalem vel liberam piscariam suam fregit, et piscatus est, &c. R. Skin. 342. 4 Mod. 186. F. N. B. 87. G. Vide *Piscary* (A).

[If a person keeps goods distrained in the house longer than the time directed, he is a trespasser for the rest of the time. *Griffin v. Scott, M. 13 G. Str. 717. Ld. Raym. 1424.*]

(A 3.) General Wrong.

So, trespass lies for a general wrong to another; as, if a man takes the servant of another out of his service, and keeps him. R. 2 Rol. 556. l. 15. F. N. B. 91. L.

If A. rescues a man out of the hands of an officer who arrested him for me; for he was my servant for such purpose. R. 2 Rol. 556. l. 25. Hob. 180.

If he builds a tolbooth upon my land, without saying, *clausum fregit.* R. 2 Cro. 122.

So, if a miller takes toll of him, who ought to be free of toll; for it is tantamount to having taken his corn. 2 Rol. 556. l. 10.

If he beats the servant of him who ought to have toll, and obstructs his taking of toll. R. 2 Cro. 122.

So, trespass lies for taking a son and heir and marrying him, or a daughter and heiress. F. N. B. 90. H.

Of a canon or monk out of a religious house. F. N. B. 90. G.

Of a prisoner taken in war, or of a villein. F. N. B. 88. A. 91. E.

(B) By whom it lies.

(B 1.) Trespafs *quare Clausum fregit*.

TRESPASS, *quare domum*, or *clausum fregit*, lies by him who has the possession of an estate of freehold or inheritance, or by lease for years, or at will. 2 *Rol.* 551. l. 47. 54. *Vide post.* (C 1.—D).

So, tenant at will may have trespafs against him who ousts him. *Semb.* 2 *Rol.* 551. l. 45.

So, tenant by sufferance may maintain trespafs against a stranger. 2 *Rol.* 551. l. 42.

[By the owner of the soil, for erecting a stall in a market. *Mayor of Northampton v. Ward*, M. 19 G. 2. Str. 1238. *Wilson*, 107.]

So, it lies by him who has only *vesturam terræ*. Co. L. 4. b. R. Mo. 302.

[A. demised to B. the milk of 22 cows to be provided by A., and to be fed at A.'s expence on certain closes belonging to A.; A. covenanting that B. might turn out a mare, and that no other cattle should be depastured there: it was holden that the separate herbage and feeding of those closes passed to B., and that B. might maintain trespafs against any one infringing his right. *Burt v. Moore*, B. R. T. 33 Geo. 3. 5 T. R. 329.]

Or, *herbagium terræ*. Co. L. 4. b. 2 *Rol.* 549. l. 20. Dy. 285. Cont. 3 *Leo.* 213. R. acc. Cro. El. 421.

So, by a lessee of the pasture of such a close. R. 2 *Rol.* 549. l. 25. Mo. 302.

By a grantee of underwood, tho' the soil does not thereby pass. R. Cro. El. 413. Mo. 355.

By a grantee or lessee of the king *de exitibus* of one outlawed. 3 *Leo.* 213. Mo. 302.

But a commoner shall not have trespafs *quare clausum fregit*. Cro. El. 421.

Nor, he who has a warren in land. *Ibid.*

[But it lies by a freehold-tenant in a manor, for digging turf in his turbarry, where he has an *exclusive right* to the turf, tho' not to the feeding on it; not if he had only common of turbarry. *Wilson v. Mackreth*, H. 6 G. 3. 3 B. M. 1824.]

(B 2.) What shall be a sufficient Possession.

If a man has possession only as lessee for years, or at will, it is sufficient to maintain trespafs against a wrong-doer. 2 *Rol.* 551. l. 47. 54. *Vide ante*, (B 1.)

So, if a stranger does a trespafs to a lessee at will, which prejudices the land, the lessor may have trespafs against him for the damage to the land; for the possession of the lessee is his possession. 2 *Rol.* 551. l. 49.

So, if a lessee at will commits voluntary waste, the lessor may maintain trespafs against him; for that amounts to a determination of the will. Co. L. 57. a. 1 *Rol.* 860. l. 50.

If he dies, and his heir enters, the lessor shall have trespafs against him before entry. Co. L. 62. b. Cart. 56, 7.

So, a copyholder who is only tenant at will shall have trespafs for trees cut upon his land. 2 *Rol.* 551. l. 50.

So,

So, an intruder upon the king's possession may maintain trespass.

Al. 7.

So, a disseisee shall have trespass against a disseisor, without re-entry; for the first entry; for the disseisee was then in possession.

2 Rol. 553. l. 50. Co. L. 257. a.

So, if his estate determines, whereby he cannot re-enter; as, if he was tenant *pur autre vie*, &c. he shall have trespass for the whole time with a *continuando* against the disseisor. *2 Rol. 550. l. 15. 20.*

So, if a disseisee re-enters, he shall afterwards have trespass against the disseisor with a *continuando* for the whole time of his possession. *2 Rol. 550. l. 10. 554. l. 35. Co. L. 257. a.*

Or, against a stranger for a trespass done during the disseisin; for by re-entry he reverts the possession in himself *ab initio*. *2 Rol. 554. l. 39.*

So, against a lessee, donee, or feoffee of the disseisor. *R. 2 Rol. 554. l. 45. Cont. 11 Co. 51. R. Mo. 461.*

If a man sells his land, he shall have trespass for a wrong done before. *2 Rol. 569. l. 20.*

(B 3.) What not.

But a plaintiff cannot maintain trespass *quare clausum fregit*, if he has not actual possession, tho' he has the freehold in law; as, an heir shall not have trespass against an abator. *2 Rol. 553. l. 45.*

[Or, unless he has the exclusive possession; and therefore it will not lie for entering into a pew; because the possession of the church is in the parson. *1 T. R. 430.*]

If a wife, tenant for life, leases for years and dies, the reversioner shall not have trespass against the lessee before entry.

Nor, the heir, if an husband, seised in right of his wife, leases, and then the wife dies. *2 Rol. 552. l. 3.*

So, if the heir enters upon an abator, he shall not have trespass against him, for the wrong before. *2 Rol. 554. l. 17.*

So, a disseisee shall not have trespass against a disseisor for the continuance in possession, before his re-entry, except when his estate is determined, so that he cannot re-enter. *2 Rol. 550. l. 7. 553. l. 52.*

Tho' his entry be tolled by his own act. *2 Rol. 550. l. 25. 30.*

So, before re-entry a disseisee shall not have trespass against *A.* for a wrong done after the disseisin. *2 Rol. 554. l. 2.*

So, a bargainee shall not have trespass before entry, tho' the possession is transferred to him by the statute. *Cart. 66.*

(B 4.) What sufficient for Goods.

So, not only he who has the property, but also he who has the possession of goods, shall maintain trespass for the goods; as, if a man has cattle to agist, he shall have trespass against him who takes them. *2 Rol. 551. l. 25.*

So, a lessee of cattle for a year, for composting his land, shall have trespass against a stranger. *2 Rol. 551. l. 20.*

Or, against the lessor himself, if he takes the cattle within the year. *2 Rol. 551. l. 22.*

So, a bailee of goods awarded. *2 Rol. 551. l. 31.*

So, a bailee of goods pledged to him, if a stranger takes them. *20 H. 7. 1. a.*

So,

So, if a stray in the manor of *B.* be taken within a year, by a stranger, *B.* shall have trespass. 20 *H.* 7. 1.

So, if a man takes the goods of *B.* who afterwards grants them to another, yet *B.* after the grant shall have trespass for them. 2 *Rol.* 557. *l.* 52.

[To entitle a man to bring trespass, he must, *at the time* when the act was done, which constitutes the trespass, either have the *actual* possession in him, of the thing which is the object of the trespass; or he must have a *constructive* possession in respect of the right being actually vested in him; as, in the case of an estray or wreck, before seizure by the lord. 1 *T. R.* 480.]

[So, the executor has a *constructive* possession from the testator's death. *Ibid.*]

[But trespass will not lie, by the assignees of a bankrupt, against a sheriff for taking the goods of a bankrupt in execution after an act of bankruptcy, and before the issuing of the commission, and after a provisional assignment, and notice from the provisional assignees not to sell. *Id.* 475.]

[*A.* having let his house ready furnished to *B.*, cannot maintain *trespass* against the sheriff for taking the furniture under an execution against *B.*; tho' notice were given that the goods belonged to *A.*, *A.* not having the possession, trover was the proper action. *Ward v. Macauley*, *B. R. M.* 32 *Geo.* 3. 4 *T. R.* 489.]

If a man sells goods at *London* to *A.* in *York*, *A.* shall have trespass before actual taking; for the possession is immediately in him. *Latch*, 214.

So, an executor shall have trespass for the goods of his testator, tho' he does not say that they were taken out of his custody; for the possession upon the death of his testator is vested in him. *Per two J.* 2 *Cro.* 113.

So, trespass lies for goods taken after delivery by *replevin*. 2 *Rol.* 569. *l.* 17.

Or, after retaking by the owner. 2 *Rol.* 569. *l.* 25.

Or, after his lease, or interest, determined. 2 *Rol.* 569. *l.* 30.

If trespass be done to goods in the hands of a bailee, trespass lies by the bailee. 2 *Rol.* 551. *l.* 31.

And also by the bailor, and he, who first recovers, shall have the damages. 2 *Rol.* 569. *l.* 22.

So, trespass lies by a sheriff for taking goods in his hands upon execution before sale.

Tho' the taking be by the defendant himself against whom the execution was. *R. Cro. El.* 639.

So, trespass lies for the master of a ship, who had the possession and was taken for the voyage, for a detainer of it. *R.* 1 *Sal.* 11.

So, trespass lies for goods taken; tho' they are afterwards altered in form.

(B 5.) General Trespass; by whom it lies.

So, trespass lies by the party to whom the wrong is done.

[Trespass and false imprisonment lies in *England*, by a native of *Minorca* against the governor of that island, for an injury of that nature committed there. *Cowp.* 476.]

[So, by one hurt by the accidental going off of a gun. *Underwood v. Hewson*, *T.* 10 *Geo.* *Str.* 596.]

Tho'

Tho' the damage to him be only by consequence; as, it lies by an husband alone for the battery or threatening of his wife, *per quod consortium amisit*, or *negotia infecta reman.*, &c. *Vide in Battery (A).*

[So, *A.* throws a squib among the people at a market, it lights near *B.* who throws it from him, *C.* does the same, and it strikes *D.* and puts out his eye. *D.* has trespass *vi et armis* against *A.* *Blackstone J. contra, Scott v. Shepherd, P. 13 Geo. 3. 3 Wilf. 403. 2 Bl. Rep. 892.*]

[Trespass *vi et armis* lies against a defendant for driving his cart so furiously, that it was driven with great force against the plaintiff's carriage, and overturned and damaged it. *Day v. Edwards, B. R. T. 34 Geo. 3. 5 T. R. 648.*]

[Trespass, and not case, lies for a servant's wilfully driving against and injuring another's carriage. *Savignac v. Roome, B. R. M. 35 G. 3. 6 T. R. 125.*]

[An action on the case, and not an action of trespass, is the proper remedy for an injury done to the plaintiff's carriage by the servant of the defendant's negligently driving his master's carriage against it. *Morley v. Gaisford, C. P. E. 35 Geo. 3. 2 H. Bl. Rep. 442.*]

[If *A.* wilfully run his vessel against *B.*'s, and damage ensue, *B.* may bring trespass; but, if *A.* so negligently steer his vessel that it runs foul of *B.*'s, then case is the proper action. *Ogle v. Barnes, B. R. E. 39 Geo. 3. 8 T. R. 188.*]

So, it lies for the battery of a servant, *per quod servitium amisit*.

So, it lies by a master for the battery of his servant, *per quod*, &c. after the death of the servant. *2 Rol. 568. l. 42.*

By an husband after the death of his wife, for taking away his wife with the goods of her husband. *2 Rol. 569. l. 12.*

Or, after a divorce. *2 Rol. 569. l. 10.*

[It lies for procuring by awe, fear, and influence, contrary to his own inclination, a sovereign, independent, and absolute foreign prince, to imprison the plaintiff. *2 Bl. Rep. 1055.*]

[By a woman for an assault by defendant to whom she was married, if she proves a former marriage to one alive at the time of second marriage. *Westbrooke v. Strutville, H. 4 Geo. Str. 79.*]

So, by the *st. 4 Ed. 3. 7.* an executor or administrator shall have trespass for a prejudice to the property of the testator. *Vide in Administration, (B 13.)*

And by the *st. 25 Ed. 3. 5.* the executor of an executor.

But trespass does not lie for a battery, &c. to the person of a testator, by his executor or administrator. *Vide Administration, (B 13.)*

Nor, by an husband after the death of his wife, for a battery to the wife; for she must join. *2 Rol. 568. l. 50.*

Nor, by a father for the battery of his son. *Cro. El. 55. R. Ray. 259. Mont. & Atkins cont.*

Or, the imprisonment of a son or daughter. *R. Cro. El. 770.*

[Where a justice of the peace maliciously grants a warrant against another, without any information, upon a supposed charge of felony, trespass lies against him. *Morgan v. Hughes, B. R. H. 28 Geo. 3. 2 T. R. 225.*]

[And trespass is the only remedy. *Ibid.*]

[If *A.*, having been robbed, suspect *B.* to be guilty, and take and deliver him into the charge of a constable present, *B.*, if innocent, may

may maintain trespass against *A. Stonehouse v. Elliott, B. R. T. 35 Geo. 3. 6 T. R. 315. Vide supra, Imprisonment, (H 8.)*

Nor, for taking away any son or daughter, who is not an heir. *R. Cro. El. 770. Vide in Guardian, (H 5.)*

So, if a wrong be done to several at the same time, trespass lies for each severally, for the wrong to him; for trespass is several in its nature. *3 Lev. 354.*

(C) Against whom it lies.

(C 1.) Trespass *Quare Clausum fregit.*

TRESPASS lies against him who does the trespass, and all aiding, &c.; for there is no accessory, but all are principals in trespass.

So, trespass lies against each severally, where many do a trespass; for it is joint and several in its nature.

So, against *A. simul cum diversis aliis ignotiis. R. 1 Leo. 41.*

Or, against *A. simul cum B. & C. R. cont.* by common law; but it shall be aided as form after a verdict. *1 Leo. 411. 3 Leo. 77.*

So, against all who procure or command it. *4 Inst. 317.*

Or, against him who afterwards assents to a trespass done for his use or benefit, tho' not privy at the time of doing it. *4 Inst. 317.*

So, if he assents to the act of his servant in seizing goods, he will be a trespasser for misusing of the goods in seizure, tho' not privy to the misusage. *R. Lane, 90.*

So, trespass, for a battery in ravishing his wife, lies against the wife and others; for she may be assenting. *2 Rol. 553. l. 35. Bra. Rape, 2.*

So, it lies against *A.*, who comes in aid of *B.*, tho' he does nothing. *2 Rol. 555. l. 7.*

Or, if he commands *B.* to do, tho' he be not present. *2 Rol. 555. l. 10.*

So, trespass lies against *A.* if his wife puts his cattle into the land of another. *2 Rol. 553. l. 30.*

If the sheriff, by his order, takes in execution the goods of a stranger. *2 Rol. 553. l. 5. 10.*

But if a servant puts the cattle of his master, without his privity, into the land of another, trespass lies against the servant, and not against the master. *2 Rol. 553. l. 25.*

If the bailiff of a franchise takes the goods of a stranger in execution, trespass lies against him, not against the sheriff. *2 Rol. 552. l. 40.*

So, if the bailiff of a sheriff detains in custody after a *supersedeas*, trespass lies against him, and not against the sheriff. *R. 2 Rol. 552. l. 45.*

[But trespass will lie against the sheriff, if his officer take the goods of *A.* on a *fi. fa.* against those of *B.* *Doug. 40.*]

So, if the sheriff takes a furnace, &c. fixed to the freehold, trespass lies against him, but not against the party, tho' it is delivered to him. *R. 2 Rol. 556. l. 50.*

So, if the sheriff does not return his writ, &c. trespass lies against him, but not against the party, or bailiff. *Vide Return, (F 1.)*

So, if a man receives him who has done a trespass, knowing him to have done so, he is no trespasser.

If a man commits a trespass by mistake, or inadvertency, trespass lies against him; as, if a sheriff or bailiff takes the goods of one instead of another. 2 *Rol.* 552. *l.* 17. 22.

Or, arrests *A.* instead of *B.* 2 *Rol.* 552. *l.* 25.

Or, attaches *A.* by the goods of *B.* or of his master. 2 *Rol.* 552. *l.* 20.

Tho' it be by the shewing of the party to the suit. 2 *Rol.* 552. *l.* 30.

If an executor cancels an obligation of his testator to *A.* which he finds, supposing that it is cancelled. *R.* 2 *Rol.* 563. *l.* 45.

If a man's cattle escape into the land of another, against his will. 2 *Rol.* 568. *l.* 15.

So, if the cattle of him in reversion after the death of *cestuy que vie*, &c. trespass on the corn of tenant for life against the will of the owner. *R.* 2 *Rol.* 568. *l.* 20.

So, trespass lies against *A.*, if cattle in his custody do a trespass. 2 *Rol.* 546. *l.* 20.

Or, against the owner of the cattle at election. 2 *Rol.* 546. *l.* 20.

[Trespass lies against tenant in possession, after judgment against the casual ejector for the mesne profits, from the time he has notice of lessor's title, tho' he lets judgment go by default, and his name does not appear in the record of judgment against casual ejector. *R.* by all the Judges, 2 *Wils.* 115.]

[If a man has apprentices, and puts them in custody in a lockup-house, and they complain to quarter-sessions of being ill-used, &c. and their fear of being sold to *Guinea*, and the court discharges them, *W.* lieutenant of a man of war agrees with them to serve, and gives *A.* money to keep them that night, and next morning sends press-gang for them, with a note to *A.* to deliver them, which he does, taking a receipt; trespass *vi et armis* lies against *W.* for he sent force. *Reavelly v. Mainwaring*, *H.* 2 *Geo.* 3. 3 *B. M.* 1306.]

But trespass does not lie against a man not consenting or aiding to it; as, if *A.* strikes an horse upon which *B.* is riding, whereby he throws down another, trespass does not lie against *B.* *Sal.* 637, 8.

[So, trespass does not lie against a pound-keeper merely for receiving cattle, tho' the taking was tortious; for he is bound to keep whatever is brought to him. Otherwise, if he go beyond his duty, and assent to the trespass. *Cowp.* 476.]

So, trespass does not lie against a lord, because his distress is unreasonable, or carried into another county; for by the *st. Marl.* 4. *Non puniatur per redemptionem*; but there shall be an action upon that statute. 2 *Inst.* 105, 106.

Nor, by the equity of the statute by a lessee for years against the lessor. 20 *Ed.* 4. 2, 3. *R.* *Dal.* 3.

Yet, it lies, if the lessor spoils, or destroys the goods. 20 *Ed.* 4. 3. *a.*

[The court will not join declarations against separate persons, on an affidavit that the trespass, if any, was committed by all jointly; for that would deprive the plaintiff of the benefit of the evidence of one against the other. *Bayley v. Raby*, *P.* 7 *Geo.* *Str.* 420.]

(C 2.) What Act makes a Man a Trespasser *ab initio*.

So, if a man has an authority or licence given him by law, and he abuses it by misfeasance, he shall be a trespasser *ab initio*; as, if a man who takes a distress, works, or kills it. 8 Co. 146. *Vide in Distress*, (D 6.)

[If an officer attach goods, and continue possession of the house, or keep the goods therein for a long and unreasonable time, without removing them to a place for safe custody, he is a trespasser *ab initio*. 2 Bl. Rep. 1218.]

If a lessor, who enters to view if waste be done, damages the house. 2 Rol. 561. l. 27.

Or, stays there all night. 2 Rol. 561. l. 27.

If a commoner enters to view his cattle, and cuts down trees, &c. 8 Co. 146. b.

If a purveyor, who takes my cattle for the king's house, sells them. 2 Rol. 561. l. 29.

If a searcher unpacks stuffs, and puts them in the dirt, whereby they are damaged. R. 2 Rol. 561. l. 30. Lane, 90.

So, if his servant, or assistant, does it, without his direction. 2 Rol. 563. l. 5. Lane, 90.

If a man enters a tavern, and continues there all night against the will of the taverner. 2 Rol. 561. l. 35.

If a man will impark goods distrained after amends tendered. 2 Rol. 561. l. 45. *Semb. cont.* 8 Co. 146. b.

[If a man converts a hog taken damage-feasant. *Dye v. Leatherdale*, M. 10 Geo. 3. 3 Willf. 20.]

If the lord of a manor works a stray within the year. R. 2 Rol. 562. l. 15. *Vide in Waife* (F).

[Altho' the original taken be admitted to be lawful. 1 T. R. 12.]

Or, the lord of a fair or market works an horse distrained for toll. 2 Rol. 562. l. 20.

So, if the bailiffs of a town who by custom seize an hide, for non-payment of a customary duty for hides of all oxen killed and sold within the town, tan it, to prevent putrefaction. R. 2 Rol. 562. l. 25.

So, if the sheriff does not return a writ where he ought, or makes a false return. 2 Rol. 563. l. 15. 20. *Vide in Return*, (F 1, &c.)

If a sheriff, or any in his aid, makes *replevin* after a claim of property notified to him by the owner. R. Mod. Ca. 68. 139.

If an escheator takes the goods of one outlawed after a writ *de non molestando* shewn to him. 3 H. 7. 1.

So, if a man abuses a trust or confidence reposed in him, he will be a trespasser *ab initio*; as, if lessee at will commits voluntary waste, by throwing down an house, cutting down trees, &c. Co. L. 57. a. 5 Co. 13. b. 2 Rol. 555. l. ult. R. Mo. 248.

If a shepherd kills sheep committed to his care. Co. L. 57.

Or, for a special purpose; as, to plough or dung his land. 2 Rol. 556. l. 5.

If a servant, or assistant, intrusted to sell goods in a shop, embezzles them to his own use. R. 1 Leo. 87. R. Mo. 248.

So, if a man has colour of an authority, and afterwards it is vacated and declared to be null, he will be a trespasser *ab initio*; as, if a man

a man obtains judgment irregularly, and afterwards takes out execution, the party (tho' not the officer) will be a trespasser, if the judgment be vacated. *R. 1 Lev. 95. but Twissd. dub.*

So, if a man has an authority given by statute, and does not pursue, or abuses his power; as, if a man having authority by the *st. 2 W. & M.* to sell a distress for rent, if it be not replevied within five days after notice, &c. sells it without notice given. *Adm. 4 Mod. 391.*

[If a man puts cattle, which he impounded *damage-feasant*, into the next pound which happens to be in another county, it does not make him a trespasser, but he is subject to the penalty of *st. 1 & 2 P. & M. c. 12. Gimbart v. Pelah, T. 21 Geo. 2. Str. 1272.*]

[Beasts dying after put in the pound, does not make a man trespasser *ab initio*; but case will lie. *Gates v. Bayley, T. 6 Geo. 3. 2 Will. 313.*]

(D) When Trespass does not lie.

BUT a man shall not be charged in trespass for goods which he had by the delivery of the party himself, except where by a wrongful act he makes himself a trespasser *ab initio*; as, if *A.* delivers goods to *B.* for custody, who afterwards will not re-deliver them, trespass does not lie against *B.* *2 Rol. 555. l. 27. 40.*

[Trespass does not lie where an inclosure-act gave the commissioners power to set out and make roads, &c. and directed that the expences of making and repairing those roads and all other expences, should be borne by the proprietors in certain proportions, to be ascertained by the commissioners in one general rate; and then gave an appeal to the sessions where the parties thought themselves aggrieved; but the party thinking himself aggrieved must appeal to the sessions. *Bonnell v. Beighton, B. R. E. 33 Geo. 3. 5 T. R. 182.*]

So, if *A.* permits his goods to remain with *B.* for his own use, and *B.* delivers them to *C.* to carry to another place, trespass does not lie by *A.* against *C.* *2 Rol. 555. l. 35.*

Nor, for goods which come to him by authority in law. *2 Rol. 555. l. 43. Vide ante, (C 2.)*

As, if *A.* takes goods by delivery of the sheriff upon a *replevin*. *2 Rol. 555. l. 45. 565. l. 45.*

Or, takes them upon an execution, tho' it be not regularly made. *2 Rol. 556. l. 50.*

Upon a sale. *R. 2 Rol. 556. l. 52.*

If a constable takes goods waived for the use of the owner, tho' he afterwards refuses to deliver them to him, trespass does not lie, but *detinue*. *R. 2 Rol. 555. l. 50. 561. l. 40.*

Nor, for goods which a man takes only for security for the use of the owner; as, if goods are thrown by tempest into the sea, and a stranger takes them, and delivers them to the servant of the owner for him. *2 Rol. 555. l. 47.*

So, the master of a barge in a tempest may throw goods into the sea for the safety of the passengers. *R. 2 Rol. 567. l. 5.*

Nor, for goods which a man has lawfully, tho' the possession of him from whom he had them was wrongful; as, if *A.* takes the horse of another and sells him to *B.*, trespass does not lie against *B.* *2 Rol. 556. l. 52.*

So,

So, if a man has licence or authority from the plaintiff himself, trespass does not lie against him, tho' he abuses his licence by misfeasance. *R. 8 Co. 146. b.*

So, if a man has licence or authority by law, and afterwards does not do what he ought, trespass does not lie against him; for nonfeasance does not make him a trespasser *ab initio*. *R. 8 Co. 146. b.*

As, if after a distress, the rent or sufficient amends are tendred, trespass does not lie; tho' the party refuses delivery of the goods distrained. *8 Co. 146. b.*

[Trespass does not lie against excise-officers who enter into a person's house by virtue of a legal warrant to search for smuggled goods, tho' none be found; but case lies for maliciously obtaining or executing the warrant. *1 T. R. 535.*]

[Nor, for taking *excessive* distress; but a special action on the statute of Marlbridge. *Lynne v. Moody, M. 3 Geo. 2. Str. 851. Hutchins v. Chambers, P. 31 Geo. 2. 1 B. M. 579.*]

[Unless the distress is of gold or silver, which are of a certain known value, and even the measure of the value of other things. *Moir v. Munday, H. 28 Geo. 2. cited in Hutchins v. Chambers, supra.*]

If a man comes into a tavern, or common inn, and afterwards refuses paying for wine. *R. 8 Co. 146. b.*

If a sheriff after an arrest refuses bail. *R. 2 Rol. 561. l. 50. 562. l. 10. Cro. Car. 196. Vide Bail, (K 6.)*

So, trespass *quare clausum fregit*, or general trespass, does not lie where damage is done to a privilege or liberty which a man has in the soil of another; but he may have an action upon the case; as, a commoner shall not have trespass for damage to the soil or grass. *Vide in Common (H—I).*

So, if a man has a free warren in the land of *B.*, he shall not have trespass, for that *latibula libera warrenna sua prostravit, &c. per quod cuculi, &c. interierunt.* *R. 2 Rol. 550. l. 45.*

So, trespass does not lie, where the damage accrues to the goods by his own neglect or default; as, if *A.* gives licence to *B.* to put hay, &c. upon his land till it can be sold, and afterwards leases the land to *C.*, trespass does not lie by *B.* if his hay be consumed by the cattle of *C.*; for he ought to secure the hay at his peril. *R. 2 Rol. 143. 152.*

So, trespass does not lie, where the act is not against the peace, or wrongful, but the effect of cunning or contrivance; as, if a man procures the servant of another to go out of his service, and then retains him, but does not take him away. *2 Rol. 556. l. 17.*

So, trespass does not lie against the servant, if he departs out of the service of his master. *2 Rol. 556. l. 20.*

So, trespass does not lie for a lawful act, tho' in consequence damage is done to another; as, if a man fixes a spout to his house, which, upon rains, throws water upon the wall of another; but there may be an action upon the case. *R. 2 Mod. Ca. 272. [Reynolds v. Clarke, T. 11 Geo. Str. 634. 2 Ld. Raym. 1399. Fort. 212.]*

[So, trespass does not lie for an imprisonment which was merely in consequence of the capture of a ship as prize, tho' the ship shall have been afterwards acquitted. *Doug. 594.*

[Trespass does not lie, if a ship be seized, as forfeited by the navigation act 12 Car. 2. c. 18. by a governor of a foreign country belonging

longing to *Great-Britain*, although he has not proceeded to condemnation; for by the forfeiture the property is divested out of the owner. *Wilkins v. Despard*, B. R. H. 33 Geo. 3. 5 T. R. 112.]

So, trespass does not lie for an act which is felony; as, for a battery, of which the party dies within a year. 2 Rol. 557. l. 5. *Vide Action upon the Case*, (B 5.)

For taking goods which was a robbery, if it appears to be a felonious taking. R. 2 Rol. 557. l. 10. 1 Mod. 283.

If it appears upon evidence, or by plea. *Semb.* 2 Rol. 557. l. 10. 20. R. 1 Mod. 283.

For breaking an house and taking money, for which he was convicted of *burglary*. *Dub. Jon.* 148.

But if a man prosecutes for the felony, and the party is acquitted or burned in the hand, he may have trespass; for he has done what the law required against him for the felony, and then the trespass remains. R. 2 Rol. 557. l. 25. R. *Jon.* 150.

So, if the defendant pleads a conviction of felony, it is no bar; for the plaintiff was not a party, and therefore not estopped by the record. *Semb.* 2 Rol. 557. l. 10.

So, if he pleads a conviction uncertainly. R. *per three J. Jon.* 147. *Latch*, 145.

So, in trespass for taking goods, if it does not appear by the declaration, &c. that the taking was felonious, the defendant cannot say so. R. 1 Mod. 283.

So, trespass does not lie against a man for taking goods which he found. R. 2 Rol. 555. l. 50.

Unless, after the finding, he embezzles the goods. R. 2 Rol. 563. l. 45.

For throwing down a nuisance. 2 Rol. 565. l. 50.

So, trespass does not lie, if cattle enter the close of another for want of repair of the fences. 2 Rol. 565. l. 30.

If a man enters land to drive back his cattle, escaped thither for want of fences. 2 Rol. 565. l. 35.

Or, to drive back wild beasts, escaped for want of paling against a forest. 2 Rol. 565. l. 40.

Or, to retake his goods, carried thither by the occupier of the land. 2 Rol. 565. l. 54.

But it is not justifiable to enter land with cattle; because it lies open to the highway. 2 Rol. 565. l. 47.

Or, to enter to search for goods stolen, without reason of suspicion that they are there. R. 2 Rol. 565. l. 15.

Or, to enter upon a common report, that his trees dug up are carried thither, that not being felony. R. 2 Rol. 564. l. 30.

Or, to enter for retaking goods, which he, who holds them in common with me, put there; for tho' a tenant in common may retake goods in common, when the other takes them, yet he cannot justify a trespass to do it. R. 2 Rol. 566. l. 30.

So, if a man imprisons me, of his own wrong, I may justify the breaking of windows or doors to get out; for it was his fault. 2 Rol. 566. l. 5.

If a man, by neglect, suffers his house to be on fire, I may pull it down for the safeguard of mine adjoining. 2 Rol. 566. l. 3.

If a man takes an handful of grain from my heap, I may take as much from his heap. *R. 2 Rol. 566. l. 12.*

If a man throws his grain or money to my heap, I may take the whole. *R. 2 Rol. 566. l. 15.*

If cattle or goods are *damage-feasant*, I may drive or remove them out. *R. 2 Rol. 566. l. 20. 35. R. 4 Co. 38. b.*

But I cannot kill or damage them.

Nor, can I kill a tumbler hunting in my warren. *R. 2 Rol. 567. l. 35.*

So, if a man fells me all his trees, I shall have liberty to come upon the land, to cut them down, and carry them away when I please. *R. 2 Rol. 567. l. 40.*

So, a grantee of a water-pipe, &c. shall have liberty to mend it. *2 Rol. 567. l. 45.*

An executor has liberty to enter to take the timber of the deceased. *2 Rol. 564. l. 25.*

A reversioner, &c. to view waste, if he does not break a door or window. *2 Rol. 568. l. 5.*

If cattle, in passage on the highway, eat herbs or corn *raptim et sparsim* against the will of the owner, it will excuse the trespass. *R. 2 Rol. 556. l. 55.*

[But if defendants enter plaintiff's close, where there is no foot-path, and adjoining to his paddock, with guns and dogs, dog runs into the paddock and kills a deer; trespass lies, for it cannot be called involuntary. *Beckwith v. Shoredike et al. P. 7 G. 3. 4 B. M. 2092.*]

But trespass is not excused on pretence of charity; as, if a mother enters the house of another, to visit her sick daughter there, without asking leave. *R. 2 Rol. 567. l. 15.*

Or, on pretence of sport; as, for the hunting of a fox or badger. *R. tho' it be for the public good. 2 Rol. 558. B.*

[But a man may justify a trespass in following a fox with hounds over the grounds of another, if he does no more than is necessary to kill the fox. *1 T. R. 334. Vide 3 T. R. 259. n.*]

If a man sets a falcon at a pheasant in his own land, he cannot pursue it into the warren of another. *2 Rol. 567. l. 30.*

[It does not lie for seizing a house in the *East Indies*. *Shelling v. Farmer, M. 12 G. Str. 646.*]

[It lies not for the father, for assaulting and getting with child his daughter, *per quod servitium*, &c.; if she was of age, and away from her father's house, in service; but if she was under age, and under her father's roof, it lies. *Postlethwaite v. Parkes, P. 6 G. 3. 3 B. M. 1878.*]

[It lies where the daughter resides with her father, tho' she be above twenty-one years of age, and tho' no contract of service be proved, if act of service be really proved. *2 T. R. 166.*]

[Trespass will not lie against the sheriff or his officer for arresting a certificated bankrupt, a peer, a discharged insolvent, &c. *Doug. 671.*]

Vide more concerning Trespass, in Action on the Case, (B 6.)—Dismes, (M 12.)—Justices of Peace, (B 11.)—Pleader, (3 M 1, &c.)

TRIABLE PLEA.

Vide Pleader, (E 34.—G 7.)

TRIABLE ISSUE.

Vide Pleader, (R 10.)

T R I A L.

(A) The several Sorts of Trial.

WHEN trial shall be by the country, *vide in Enquest, (A 1, &c.)*

The antiquity, number, qualification, exemption, and challenge of jurors, *vide in Challenge, (A 1, &c.)*

What process there shall be against jurors, *vide in Enquest, (C 1, &c.)*

When trial shall be by certificate of the ordinary, recorder, marshal, &c. *vide in Certificate.*

Trial of a peer shall be by his peers. Of which *vide Parliament, (L 16. 26.)*

Of peerage, whether he be a baron or not, shall be tried by the writ of summons to parliament. *Vide in Dignity (D).*

Trial of *antient demesne* shall be by *Doomsday Book.* *Vide in Antient Demesne, (F 7.)*

(A 1.) By Record.

A matter of record is of so high a nature, that it shall be tried only by itself. 9 Co. 25. a. 31. a. 2 Rol. 574. l. 7.

And therefore, if to a judgment, statute, or recognizance, alleged in pleading, *nul tunc record* be pleaded, it shall be tried by the record itself. 2 Rol. 574. l. 17. 50. *Vide in Record (B).*

So, to a recovery of fine. Pl. Com. 15. a.

So, to an indictment, or acquittal upon it. 2 Rol. 574. l. 11.

So, if the issue be, whether the plaintiff be an *alien enemy*, it shall be tried by the league, which ought to be upon record. 9 Co. 31. a. 2 Rol. 575. l. 50.

Whether a protection was allowed in court. 2 Rol. 574. l. 15.

Whether the defendant was committed to prison. 2 Rol. 574. l. 20.

So, in an action for an escape after a *cepi corpus* returned, if the issue be, whether he was in custody of the sheriff. 2 Rol. 574. l. 24.

Whether he was in execution for such a cause. 2 Rol. 574. l. 20.

Whether he be rendred in execution in discharge of his bail. 2 Rol. 576. l. 5.

Whether such an one was a justice of peace. 2 Rol. 544. l. 30.

Or, sheriff. 2 Rol. 575. l. 25. 32 H. 6. 27.

So, whether he was sheriff on such a day; for the letters patent shew when he was made sheriff; and he continues so, till discharged by matter of record. R. 2 Rol. 575. l. 30.

Whether he was a baron, earl, &c. 2 Rol. 575. l. 5. *Vide in Dignity*, (D—F 1, 2.)

[Whether a man is an attorney. *Foster v. Cale*, H. 4 G. Str. 76.]

What is matter of record, *vide in Record* (A).

What will be a material variance, what not, *vide in Record* (C).

(B) Trial by the Justices.

(B 1.) By Inspection.

(B 1.) *When* [If there be a question, whether a fine, statute, recognizance, or other matter acknowledged before a judge of record, was done by an infant or not? it shall be tried by inspection of the justices, for an act done by a judge of record shall never be tried by the country. 9 Co. 30. b.]

And therefore, in error by an infant to reverse a fine levied during his nonage, if there be issue upon it, it shall be tried by inspection. 9 Co. 30. b. R. 2 Rol. 572. l. 10.

So, in an *audita querela*, to be relieved against a statute or recognizance acknowledged in his nonage. 9 Co. 30. b. R. 2 Rol. 572. l. 25. 573. l. 50. Yel. 88. 3 Mod. 229.

So, in error to reverse a recovery against him by default. 2 Inst. 483, 484.

So, in an appeal by an infant, if there be issue upon the infancy, it shall be tried by inspection. 2 Rol. 572. l. 21.

So, in *account* by or against an infant. 2 Rol. 572. l. 30.

So, if tenant, by *receipt*, *aide prier*, or *vouchee*, pray, that the *parol* may demur for his nonage, it shall be tried by inspection. 2 Rol. 572. l. 12. 32. 9 Co. 31. a.

If judgment be for the infant, upon inspection in an *audita querela*, and afterwards reversed by error in B. R., and then another *audita querela* brought in B. R., there must be a new inspection; for an inspection in one court is not sufficient for another. B. Yel. 88.

So, tho' the new *audita querela* be in C. B., where the former inspection was. *Ibid.*

Yet if he be of full age before the second *audita querela*, he may be relieved upon an allegation of the former inspection, and the judgment for him, and the reversal. R. 2 Cro. 59.

(B 2.) *When not.*] But if nonage be confessed, no inspection is necessary; for the party has the effect of the plea. 2 Rol. 572. l. 35.

So, if an infant, after full age, would avoid an act done by him for his nonage, it shall be tried by the country, for inspection will be of no effect; as, if there be error to reverse a judgment, because that he, being an infant, appeared by attorney, it shall be tried by the country, whether he was an infant. 9 Co. 30. b. 2 Rol. 573. l. 15.

Or, to reverse a common recovery, suffered by him within age (admitting it to be error). 2 Rol. 573. l. 45.

So, in *account*, if the defendant pleads infancy at the time of bailment. 2 Rol. 572. l. 40.

So, tho' he be an infant at the time of error sued; for judgment shall

shall be reversed, as well when of full age, as when an infant. *R. 2 Rol. 573. l. 25. 45.*

So, in all cases where infancy is triable by inspection, if there be a doubt, the court may direct a trial by the country. *2 Rol. 573. l. 35.*

(B 3.) *How tried.*] If a trial by inspection be required, and the infant is not in court, a *venire* shall be awarded against him; as, if the voucher of an infant be counterpleaded. *2 Rol. 573. l. 12.*

So, if it be prayed in aid of an infant. *9 Co. 31. a.*

But if he pleads infancy by his guardian, the guardian shall be commanded to have the infant in court at the day to be inspected, without a *venire facias*. *2 Rol. 573. l. 10.*

If the court be in doubt upon inspection, they may inform themselves by proofs; as, by examination of the mother, godfather, &c. *2 Rol. 573. l. 5. Pal. 326.*

So, they may examine the infant himself upon a *voyer dire*. *2 Rol. 573. l. 3.*

(B 4.) By Examination without Inspection.

So, the customs and usages of a court shall be tried by the justices of the same court. *9 Co. 30. b.*

So, if *A.* makes an attorney in court, and the defendant pleads that the plaintiff is dead, and *A.* says that he is the plaintiff; the justices are to adjudge whether *A.*, who now appears, be the same person who made the attorney. *9 Co. 30. b.*

(B 5.) By Witnesses.

So, in dower, if the tenant pleads, that the husband is alive; it shall be tried by witnesses. *9 Co. 30. b. Vide in Pleader, (2 Y 9.)*

So, in an appeal by a woman, of the death of her husband, if the defendant pleads that the husband is alive. *9 Co. 30. b.*

In an assise by *A.* who was the wife of *B.* *9 Co. 30. b.*

So, whether such and such be summoners or viewers, shall be tried by the court by witnesses. *9 Co. 31. a.*

So, whether a summons be well made. *Cro. El. 42.*

And the court themselves ought to make the examination, not the clerks. *Cro. El. 43.*

Where the trial is by witnesses, there must be two witnesses at least. *Pl. Com. 12. a.*

(C) Trial at Bar; when it shall be.

TRIAL shall be at bar, or at *nisi prius*:

[The granting of a trial at bar is in the discretion of the court, and must depend on the particular circumstances of the case. *1 T. R. 363.*]

If a justice of one bench or the other be concerned, the trial shall be at bar upon motion without *affidavit*. *1 Sid. 407.*

So, if a master in Chancery. *Ibid.*

[Granted on consideration of the consequence of conviction on an information. (*Scil.* Forfeiture of the auditorship of imprests.) *Ren v. Foley & Harley, B. 3 G. Str. 52.*]

[But not in an issuable term. *Per Parker Ch. J. ibid.*]

[Where plaintiff makes but one title, he shall have it, on affidavit of value, tho' several defendants have but small interest. *Preston v. Lingen*, M. 8 G. Str. 479.]

[Granted on an information against a justice of peace for neglect and abuse in relation to deer-stealers, on affidavit of his fortune, and the great number of witnesses. *Rex v. Johnson*, M. 12 G.

N. B. In information exhibited by attorney-general, he has a right to bring it to the bar. Str. 644.]

[No trial at bar granted before issue joined. *Case of Christ-Church*, P. 12 G. Str. 696.]

[It shall not be granted on motion, on an information for a misdemeanor carried on by a private prosecutor. *Rex v. Hales*, M. 2 G. 2. Str. 816.]

[But on an authority from the king to prosecute, it shall be granted as of right to the king in his own cause. *Ibid.*]

[There can be no trial at bar in London; for the citizens are not to be brought out of the city. *Castell v. Bambridge*, H. 3 G. 2. Str. 854.]

[Trial at bar ought not to be granted, unless the case is of difficulty, or requires great examination, and is also of considerable value. *Crofts v. Wills*, T. 11 & 12 G. 2. Andr. 271. *Vide Doug.* 437.]

[And the court will refuse it, tho' the estate is of great value, and the matter intricate, if many witnesses are old and infirm, and the place remote. *Martin v. Sparrow*, T. 11 & 12 G. 2. Andr. 273. *Barnes*, 447.]

[Or, if the court grant it when one of the witnesses is old, it will be on condition that he be examined on interrogatories, and that his depositions be read, if he die before the trial. *Doug.* 438.]

[The court will also, in some cases, lay the party applying under terms, that if he succeed, he shall be satisfied with *nisi prius* costs; but if he fail, he shall pay bar costs. *Ibid.*]

[Granted in action for criminal conversation, laid at 50,000*l.* damages, on defendant's affidavit of having twenty witnesses, consenting to plaintiff's examining a witness before a judge, and waiving privilege of parliament. *Barnes*, 438.]

[It may be moved for in ejectment, before appearance. *Barnes*, 455.]

When and how at *nisi prius*, vide *Enquest*, (A 1.—C 1, &c.)

[(D) When the Trial shall be put off.]

[IF a party want the testimony of witnesses who are out of the jurisdiction of the court, and whom, therefore, he cannot compel to attend, the court may put off the trial from time to time till the other party consent that depositions shall be taken where they are. *Cowp.* 174. *Vide* 1 *Bl. Rep.* 512. *Doug.* 419.]

[But a trial will not be put off, on the general affidavit of the absence of material witnesses, where the case is suspicious, and the witnesses are foreigners, never likely to return to England. 1 *Bl. Rep.* 510.]

[And where a witness is likely to be absent for a considerable time, as 18 months, a special case is requisite to put off a trial for want of his evidence. 1 *Bl. Rep.* 436.]

[Trial

[Trial on collateral issues, tho' in capital cases, shall not be put off, unless the defendant make oath of the truth of his plea. 1 *Bl. Rep.* 4. 512.]

[(E 1.) New Trial.]

[THE court may in any case grant a new trial, on the ground of excessive damages. 1 *T. R.* 277.]

[But in a case of *tort*, the court will not grant a new trial for excessive damages, unless they be outrageously disproportioned to the nature of the injury, or the circumstances of the parties. 2 *Bl. Rep.* 1327. 929. 2 *T. R.* 166.]

[The court did not grant a new trial in an action for criminal conversation, tho' the damages appeared to them excessive. *Duberley v. Gunning*, *B. R. E.* 32 *Geo.* 3. 4 *T. R.* 651.]

[Nor, in an action for enticing away the plaintiff's wife. *Winmore v. Greenbank*, *C. P. T.* 18 & 19 *Geo.* 2. *Willes*, 577.]

[After a full trial by a competent jury, if no fresh light can be thrown on the case, a new trial shall not be granted. 1 *Bl. Rep.* 418.]

[Nor, shall it be granted where the verdict is not contrary to evidence or law, tho' contrary to the opinion of the judge. 1 *Bl. Rep.* 1.]

[If the court see that justice has been done between the parties, they will not set aside the verdict, nor enter into a discussion on the question of law, tho' application be made on the ground of a misdirection. 2 *T. R.* 4.]

[Surprise may be a ground for a new trial; but it is not necessarily so. 1 *Bl. Rep.* 298.]

[Nor, shall a new trial be granted, merely because the counsel of the party applying thought it prudent to omit material evidence, which they had in their briefs; nor, because another jury, in a cause nearly similar, on hearing that evidence gave a different verdict. 2 *Bl. Rep.* 802. 2 *T. R.* 113.]

[But the discovery of new evidence, by the attorney of a defendant executor, then absent from *England*, tho' in the actual custody of the defendant himself, but not known by him so to be, is a ground for a new trial. 2 *Bl. Rep.* 955.]

[An exception to the competency of witnesses, discovered after a trial, is not of itself a sufficient ground for granting a new trial, tho' it may have weight with the court, where the party applying appears to have merits. 1 *T. R.* 717.]

[Where there are two contrary verdicts, and the latter is satisfactory to the court, the losing party is not entitled, by any rule or practice, to a third trial. 2 *Bl. Rep.* 963.]

[Nor, will a new trial be granted in an action of debt, where the verdict was only for part of the sum demanded, being what was justly due. 2 *Bl. Rep.* 1205.]

[Where a verdict on an action for words is given for a defendant, clearly against evidence, yet, if the damages on a right verdict must have been trivial, a new trial will not be granted. 2 *Bl. Rep.* 851.]

[It will not be granted to give the defendant an opportunity of proving the illegality of a policy, which was not illegal on the face of it; he should have shewn that at the trial. 1 *T. R.* 84.]

[Value and importance are not of themselves sufficient grounds for granting

granting a new trial, unless there be also some doubt in the question, tho' they frequently weigh in obtaining a rule to shew cause why there should not be a new trial. 2 T. R. 113.]

[New trials in ejectment are not usually granted, where there is a verdict for the defendant; otherwise, if there be a verdict for the plaintiff. 1 Bl. Rep. 348.]

[(E 2.) When there shall be a new Trial without Costs.]

[Where the plaintiff refuses to be nonsuited, contrary to the opinion of the judge, a new trial, if granted, shall be without costs. If he submit to an erroneous nonsuit, it shall be set aside without costs. 1 Bl. Rep. 670.]

[Where a new trial has been granted, and nothing said, in the rule, about the costs of the first; altho' the second verdict be for the same party as the first, he shall not have the costs of the first trial. Doug. 438.]

Vide more concerning Trial, in Admiralty, (E 5, 6.)—Bastard, (D 2.)—Battel,—Chancery (X—4 V).—Copybold, (R 17.)—County, (C 11.)—Dett, (G 14.)—Information, (D 7.)—Justices, (T 3.—W 1, &c.)—Prohibition, F 14.)—Wales (D).—Pleader, (R 17.)

Trial *per Medietatem Linguae.*

Vide Alien, (C 8.)

T R O V E R.

Vide Action upon the Case upon Trover.—Pleader (2 I).

T R O Y W E I G H T.

Vide Leet, (L 6.)—Justices of Peace, (B 90.)

T R U C E.

Vide Admiralty, (E 8.)

T R U S T.

Vide Action on the Case for Deceit, (A 5.—E 2, 3.)—For Negligence, (A 1.)—Administration, (C 4.)—Chancery, (2 M 9.—3 R 3.—4 W 1, &c.)

T R U S T E E.

Vide Chancery, (4 W 7, &c.)

T U M B R E L.

(A) Tumbrel, &c.; who shall have them.

THE tumbrel, or *trebutchet*, is an instrument for the punishment of women that scold, or are unquiet, now called a *cucking-stool*. *Nom. verb. Cucking-stool. Lamb. l. 1. c. 12. Vide Leet (K).*

Other instruments of punishment or correction are *furca*, or gallows. *Fl. l. 2. c. 12. f. 19.*

The pillory and stocks. *Fl. l. 2. c. 12. f. 19. Kit. 13. a.*

These instruments of correction none can set up without proper warrant.

And if the lord of a liberty set them up without warrant, he shall lose his franchise or liberty. *Fl. l. 2. c. 12. fo. 75. 2 Rol. 203. l. 10.*

And a man may have a pillory, tumbrel, and *furcas*, &c. by grant or prescription. *2 Rol. 203. l. 10.*

So, every lord of a leet ought to have them. *Kit. 13. a. Cro. El. 698. Fl. l. 2. c. 12. f. 19. Vide in Leet (K).*

And the neglect to have them is inquirable in the leet. *Kit. 13. a. Fl. l. 2. c. 12. f. 19.*

And for default the liberty may be seised. *Fl. l. 2. c. 12. f. 19. Agr. Mo. 574. Cro. El. 698.*

Or, the lord of the liberty shall be fined to the king for a neglect in his time. *Per Scrope, Kel. 149. b.*

(B) Pillory.

THE pillory is the usual punishment of any convicted of an infamous crime; as, perjury, forgery.

So, it was inflicted for false rates by a public assessor. *Mod. Ca. 306.*

So, for a libel on a magistrate, or the government. *Cro. Car. 175.*

A pillory and tumbrel, which are infamous, ought not to be used without good warrant. *3 Inst. 219.*

By the *stat. 51 H. 3. ft. 6.* a pillory of convenient strength shall be in every liberty.

And by the *ft. 31 Ed. 1. de Pistoribus*, the pillory ought to be of convenient strength, that execution may be done without peril to the body of the offender.

[The head and hands of the offender ought to be put in and through the holes in the pillory, and so continue during the whole time; if this is omitted, it is a contempt, and the court will punish the undersheriff by fine and imprisonment. *Rex v. Beardmore, T. 32 & 33 G. 2. 2 B. M. 792.*]

By the *ft. 51 H. 3. ft. 6. Aff. Pan. & Cerv.* if a baker offend, in not observing the assise, often, viz. above three times, he shall be set in the pillory without redemption.

So, by the same statute, if a brewer break the assise outrageously, or often, he shall be adjudged to the tumbrel, or other correction.

And by the *ft. 31 Ed. 1. de Pist.* if a brewer exceed the assise; for the 4th offence he shall be set in the pillory without redemption.

By the *ft. 31 Ed. 1. de Pist.* if a butcher sells swine's flesh meazled,
or

or flesh dead of murrain; for the second offence he shall be set in the pillory.

By the *st.* 31 *Ed.* 1. *de Piss.* if any sell deceitful oatmeal; for the third offence he shall be set in the pillory.

By the *st.* 31 *Ed.* 1. a forestaller, for the second offence, shall be adjudged to the pillory.

And by the *st.* 5 *Ed.* 6. 14. forestaller, regrator, and engrosser, for the third offence shall be adjudged to the pillory.

By the *st.* 19 *H.* 7. 6. he who sells pewter or brass by a deceitful beam or weights, shall forfeit 20 s.; and if insolvent, shall be set in the pillory.

By the *st.* 11 *H.* 7. 4. he who sells by false weights; for the third offence shall forfeit 20 s., and shall be set in the pillory.

By the *st.* 33 *H.* 8. 1. any convicted of getting money or other thing by counterfeit tokens or letters, shall be imprisoned, pilloried, or otherwise punished, as the justices think meet.

By the *st.* 2 *Ed.* 6. 15. artificers, &c. who conspire to enhance prices, for the second offence forfeit 20 l.; and, if they do not pay it in six days, shall be put in the pillory.

By the *st.* 5 *Ed.* 6. 6. counterfeiterers of seals to cloths shall be set in the pillory for the second offence.

By the *st.* 7 *Ed.* 6. 7. cutter or marker of fuel falsely, if insolvent, shall be set in the pillory.

By the *st.* 5 *El.* 9. convict of perjury shall be in the pillory, &c.

By the *st.* 5 *El.* 14. convict of forgery shall be in the pillory, &c.

By the *st.* 5 *El.* 16. convict of sorcery, &c. shall stand in the pillory six hours every quarter.

By the *st.* 18 *El.* 5. an informer, who compounds an offence without the assent of the court, shall stand in the pillory.

(C) Whipping.

A Person convicted of *petit larceny* shall be whipped.

But whipping ought not to be inflicted without a proper cause.

And therefore, if a man in *England* inflicts whipping upon his slave brought from *Russia*, without cause, it seems unlawful. 2 *Rush.* 468.

And, by usage in the *Star-Chamber*, a gentleman ought not to be whipped. 2 *Rush.* 468.

TURBARY.

Vide Common (A).

TURN OF A LIVING.

Vide Esq. life, (H 3, 4.)

TURN OF THE SHERIFF.

Vide Lect (A).

VACATION.

Vide Temps, (C 1, &c.)

VAGABONDS OR VAGRANTS.

Vide Justices of Peace, (B 76, &c.)

VALORE MARITAGII,

Vide Guardian, (H 7.)

V A L U E.

Vide Justices, (O 3. 8.)—Money, (B 4.)—Waste, (E 1.)

V A R I A N C E.

Vide Abatement, (G 8.—H 7.)—Amendment, (D 7, 8.—V 3.)—Bail, (R 7.)—Obligation, (B 4.)—Pleader, (C 14, 15.—S 24. 30.)—Record (C—D—F).

VENDITIONI EXPONAS.

Vide Execution, (C 8.)

VENIRE FACIAS.

Vide Enquest, (C 1, &c.)—Pleader, (2 S 12.—3 O 20.)—Process, (D 8.)

VENTRE INSPICIENDO.

Vide Bastard (C).

V E N U E.

Vide Abatement, (H 13.)—Action, (N 13.)—Amendment, (H 1, &c.)—Pleader, (S 9.)

V E R D E R O R.

Vide Chase, (Q 2.)

V E R D I C T.

Vide Abatement, (I 34.)—Amendment (P).—Appeal, (G 14.)—Estoppel, (E 10.)—Evidence, (A 5.)—Pleader, (C 87.—E 38.—R 13.—S 1, &c.)—Prerogative, (D 76.)

V E R T.

Vide Chase, (N 1, &c.)

VESTED REMAINDER.

Vide Estate, (B 17.)

V I C A R.

Vide Ecclesiastical Persons, (C 10, &c.)

VICARAGE.

Vide Ecclesiastical Persons, (C 10, &c.)

VICTUALS AND VICTUALLERS.

Vide Justices of Peace, (B 32. 87, &c.)

VIDELICET.

Vide Parols, (A 8.)

VI ET ARMIS.

Vide Action on the Case, (C 3.)—Pleader, (3 M 7.)

VIEW.

(A) When it lies.

IN all actions real, where the tenant does not know the certainty of the lands in the writ, he may demand a view of the land demanded. *Bl. Nom. verb View.*

[There may be a view in trespass, on affidavit that it will be better direction to the jury than any evidence. *Ellis v. South, T. 8 G. 2. B. R. H. 156.*]

[It is never granted without affidavit, except on actions of waste. *Barnes, 467.*]

[A view is not granted without hearing both parties, and examining into the propriety of it, unless the party applying consents, that if there is no view, or a view by any of the jurors, (tho' not of the first twelve,) yet the trial shall proceed, and no objection be made on account thereof, or for want of a proper return. *1 B. M. 252.*]

[On a view, the shewers may shew not only the place in question, but also the marks, boundaries, &c. to enlighten the viewers; and may say to them, "These are the places to which we shall adapt our evidence at trial." *Barnes, 458.*]

(B) When not.

BUT by the common law, view did not lie in dower *unde nihil habet. 2 Inst. 481. R. 2 Lev. 117.*

Nor, in any writ of dower, where the husband died seised. *2 Inst. 481. Semb. 2 Lev. 117.*

Nor, by the *st. W. 2. 48. in dote tenemento*, which the husband aliened to the tenant of his ancestor. *2 Inst. 481.*

If dower be for rent, of which her husband died seised, or which the tenant has by the release of the husband, the tenant shall not have the view. *2 Inst. 482.*

So, the tenant shall not have the view, where dower is demanded of a thing certain; as, of the *Marshalsea. 2 Rol. 728. l. 25.*

Nor, if it be a demand of tythes. *R. 2 Rol. 728. l. 45.*

Yet

Yet the tenant is not ousted of the view where he or his ancestor disseised the husband; for this is not an alienation. 2 *Inst.* 481.

Or, if the husband aliens to a woman, who afterwards marries the tenant; for the alienation was not to the tenant himself. 2 *Inst.* 481.

After a verdict in an assise, default of view shall not be alleged. *R. Mo.* 68.

Vide more concerning *View*, in *Abatement*, (1 25.)—*Forcible Entry*, (D 1. 14.)—*Pleader*, (2 Y 3.—3 O 21.)

VIEW OF FRANKPLEDGE.

Vide Lect., (A).

VI LAICA AMOVENDA.

Vide Esq. life, (N 12.)

VILL.

Vide Abatement, (H 18.)—*Parish*, (C 1, 2.)

VILLENAGE.

(A) Villien.

VILLENAGE is a servile tenure, whereby a man holds land to render to his lord *villein* service. (By *st.* 12 *Car.* 2. 24. all tenures are turned into free and common socage.) *Lit. f.* 172. 174.

As, to carry and re-carry the dung of his lord out of the city, or out of his lord's manor, unto the land of his lord, and to spread it there, &c. *Lit. f.* 172.

And it may be done by a free man, or by a villein. *Co. Lit.* 116.

Vide Homage.

(B) Villein.

EVERY *villein* is so by prescription, or by his own confession in a court of record. *Lit. f.* 175.

(C) Remedy for a Villein.

(C 1.) *Nativo habendo.*

IF the lord claims an inheritance in his *villein*, who flies from his lord against his will, and lives in a place out of the manor, to which he is regardant, the lord shall have a *nativo habendo*. *F. N. B.* 77. A.

And upon such writ directed to the sheriff, he may seize him who does not deny himself to be a *villein*. *Ibid.*

(C 2.) *When the sheriff cannot seize upon him.*] But if the defendant say, that he is a free man, the sheriff cannot seize him; but the lord must

must remove the writ by *pone* before the justices *in eyre*, or in *C. B.*, where he must count upon it. *F. N. B. 77. C. D.*

So, the sheriff cannot seize a villein dwelling in the king's *antient demesne*; for the writ *de nativo habendo* says, *nisi sit in dominico domini regis*. *F. N. B. 77. E. Co. Lit. 137. b.*

So, by the custom of *London*, if he has dwelt for a year and a day within the city. *R. Mo. 2.*

So, if he be professed in religion; for he is dead *civiliter*. *Lit. f. 202.*

(C 3.) *Libertate Probandā.*

So, upon a *nativo habendo* delivered to the sheriff before removal by *pone*, the defendant may sue a writ *de libertate probandā*; whereupon the whole shall be removed before the justices *in eyre*. *F. N. B. 77. C.*

And after removal, nothing shall be done upon the *libertate probandā*; but the lord shall count upon the *nativo habendo*. *F. N. B. 77. D. G.*

Vide more concerning *Villénage*, in *Abatement*, (E 1.—F 3.)—*Homage* (D).

VISCOUNT.

(A) Sheriff.

(A 1.) Who may be.

THE antiquity of the office of sheriff, and how constituted, *vide in County*, (B 1.)

But by the *st. de Linc. 9 Ed. 2.* none shall be sheriff unless he have sufficient land in the same county to answer to the king and his people. *Confirmed by the st. 4 Ed. 3. 9. and 5 Ed. 3. 4. 14 Ed. 3. 7. 13 & 14 Car. 2. 21. f. 7.*

So, no steward or bailiff to a great lord, unless out of service, that he may attend to execute his office.

So, by the *st. 14 E. 3. 7.* no sheriff shall continue in office above a year. *Confirmed by the st. 42 Ed. 3. 9. Vide County*, (B 2.)

So, *temp. R. 1.* it was provided, that a sheriff should not be a justice within his county. *Mad. 639.*

(A 2.) How he begins his Office.

The sheriff, after nomination to his office, and before his patent delivered, must be bound in a recognizance in the *Exchequer* to make account, and appoint a sufficient under-sheriff for execution of process.

So, he must find surety for performing his office, if the king pleases. *Mad. 642.*

So, he must qualify himself within three months, by taking the *test*, according to the *st. 25 Car. 2. 2.*

After such recognizance given, he must procure, out of *Chancery*, the patent of office, the patent assistance, and the writ for discharge of the old sheriff. *Crompt. Off. of Sher. 202, 203. Vide County*, (B 1, &c.)

He must take by indenture from the old sheriff all the prisoners and writs, &c. in his custody. *Crompt. Off. Sher. 203. Vide County*, (B 3.) Also,

Also, before the sheriff acts in his office, he must take an oath, that he will truly serve the king in the office of sheriff, &c. truly keep the king's rights, and all that belongeth to the crown, &c. not respite the king's debts for gift or favour, where it may be done without great grievance, rightfully treat the people in his bailiwick, &c. truly acquit at the *Exchequer* all those of whom he shall receive any thing of the king's debts, nothing take whereby the king may lose, or his right be letted, &c. truly return and serve the king's writs, &c. take no bailiffs but such as he will answer for, &c. return reasonable issues, &c. make due panels, &c. hath not, nor will, let to farm, &c. his sheriffwick or any office belonging to it, truly execute the laws, and in all things behave himself for the honour of the king, and good of his subjects, and discharge his office to the best of his skill and power. *Crompt. Off. Sh. 202. Vide for his oath the st. 3 Geo. 15. Vide Mod. 640. Vide Serement (A).*

[If sheriff takes bond of his bailiff to pay 20*d.* for every defendant's name in every warrant in mesne process, it is not letting his sheriffwick to farm. *Ballantine v. Irwin, M. 4 G. 2. C. B. Fort. 368.*]

If the sheriff neglects his oath, he will be in danger of perjury, and also of imprisonment of his body, and ransom at the king's will, *Dy. 61. a.*

So, if he refuses the office, being nominated by the king, an information lies against him. *2 Mod. 300.*

Tho' he was excommunicated, whereby he cannot take the *test* to qualify. *R. 2 Mod. 300.*

Or, was not qualified by taking the sacrament within a year preceding. (*Vide 4 Mod. 269. Salk. 167. 1 Ld. Raym. 29. 2 Vent. 248.*)

(B) Deputies of a Sheriff.

(B 1.) Under-Sheriff.

THE sheriff of ancient time had his under-sheriff. *Hob. 13.*

He is mentioned in the *st. W. 1. 15. 2 Inst. 191.*

And he by the *st. 27 El. 12.* must take an oath, which is now prescribed by the *st. 3 G. 15.*

When the sheriff appoints his under-sheriff, he, *ex consequenti*, gives him authority to exercise all the ordinary office of the sheriff himself; as, to execute process, &c. *R. Hob. 13.*

And therefore, a bond or covenant, that he shall not execute without his consent, is void. *Ibid.*

But a sheriff may constitute his under-sheriff at his will, and remove him when he pleases. *Ibid.*

So, tho' he makes him irrevocable, he may remove him at pleasure; for he is only his deputy. *Hob. 13.*

So, he need not make an under-sheriff; for he may exercise the office himself. *R. Hob. 13.*

If a sheriff makes an under-sheriff, he may take a bond or covenant to indemnify him from escapes, &c. *R. Hob. 14.*

But a sheriff cannot enable his under-sheriff to do a thing which the sheriff himself ought to do in person; as, to execute a writ of *waste, re-disseisin*, &c. *Hob. 13.*

[The sheriff cannot depute two persons to take an inquest. *Denny v. Trapnell, P. 8 G. 3. 2 Wils. 378.*]

So,

So, by the *st.* 3 *G* 15. none shall sell, buy, let, or take to farm the office of under-sheriff, &c. or other office belonging to the office of high sheriff, nor contract for the same for money or other consideration, directly or indirectly, &c. on pain of 500*l.*; a moiety to the king, a moiety to him who will sue, &c. Provided the suit be in two years.

Provided, nothing in this act shall prevent the sheriff, under-sheriff, &c. from taking the just fees and perquisites of his office, or from accounting for them to the sheriff, or giving security to do so, or from giving, or taking, or securing a salary or recompence to the under-sheriff, &c.

(B 2.) County-Clerk.

So, the sheriff may make a county-clerk. *Vide in County*, (C 1.)

(B 3.) Deputies to the Sheriff for Replevins, &c.

So, by the *st.* 1 & 2 *Ph. & M.* 12. the sheriff, at the first county day, or in two months after he receives his patent, shall appoint and proclaim four deputies, living twelve miles distant from each other, to make replevins, &c.

By an order in the *Exchequer*, all sheriffs shall assign their able attorney and deputy in that court, sitting the court, to attend the court, and receive and return all writs, &c. And every sheriff, on his giving a recognizance, shall deliver to the clerk in the remembrancer's office the name of the attorney or deputy assigned. *Ord. and Rules in Exch. Rule 45. p. 20.*

So, by a rule in *C. B. M.* 1654, the sheriff shall have a deputy in court to receive and return writs, whose name and place of abode in *London* or *Westminster* shall yearly, before *Hilary* term, be set up in the clerk of the warrant's office. *Mills, 2.*

(C) The Authority of a Sheriff.

(C 1.) Judicial.

THE authority of a sheriff is judicial or ministerial.

The judicial authority of a sheriff consists in holding the county-court and torne. *Of which vide County*, (C 1, &c.)—*Leet* (A).

So, by the common law the sheriff was conservator of the peace. *Vide in Justices of Peace*, (A 4.)

But now by the *st.* 1 *M. sess.* 2. *ch.* 8. no sheriff shall exercise the office of a justice of peace, within his county, during the time that he acts as sheriff.

So, in a writ of re-disseisin, the sheriff acts as a judge, as well as a minister. *Vide in Assise*, (F 2.)

So, inquiry of *waste*.

So, in admeasurement of pasture.

When a sheriff executes his judicial authority, he must do it in person; and it is not sufficient by the under-sheriff, or other deputy.

(C 2.) *To suppress insurrection. When he shall take the posse.* If there be any rebellion, insurrection, or riot, in the county, the sheriff may take the *posse comitatus* for the suppression of it. *Crompt. Off. Sher.* 209. a. 210. a. So,

So, if there be an invasion by the king's enemies.

Or, any affray, unlawful assembly, or breach of the peace within his county. (*Vide Crompt. Off. Sher.* 204. 209, 210.)

So, if it is necessary for apprehending of traitors, felons, &c. within franchises or without.

So, for the execution of judicial process, *vide in Rescous*, (D 7.)

Or, if he finds resistance in the execution of any process or the king's writ, *vide in Return*, (D 6.)

The sheriff in such cases may require the aid of all persons, above fifteen and able, within his county.

So, may the under-sheriff or his known bailiff, having the sheriff's warrant.

(C 3.) *When he has no jurisdiction.*] But by the *st. Mag. Chart.* 17. *nullus vicecomes, &c. teneat placita corona nostra.*

(C 4.) Ministerial.

The ministerial office of sheriff consists in the execution and return of all writs and process to him directed. *Dy.* 61. a. *For which vide Execution* (G).—*Process per Tot.*—*Return per Tot.*

In bailment of prisoners. *De quo vide in Bail*, (F 10.—G 2.)

In making replevin. *De quo vide in Pleader*, (3 K 1, &c.)—*Replevin* (D).

In election of knights and burgesses for parliament, coroners and verderors. *For which vide Parliament*, (D 4, &c.)—*Officer*, (G 3.)

In attendance upon the judges, justices, &c.

In proclamation of statutes.

And in keeping and collecting the rights and revenues of the king. *Mad.* 242.

(C 5.) *To collect the rights of the king.*] The sheriff by his oath is bound timely to keep the king's rights, and all that belongs to the crown, &c. *Vide ante*, (A 2.)

And it was his duty to take care of the king's manors, &c. and collect his revenue. *Mad.* 643.

And therefore, the sheriff *ex officio* may seize and take to the king's use, the profits of all lands within his county, come to the king by descent, remainder, reverter, or escheat. *Mad.* 242. 634.

Or, by attainder for treason, petit treason, or felony.

The temporalities of a bishopric. *Mod.* 207, &c.

So, before the *st.* 12 *Car.* 2. 24. the lands which he had by ward, or *primier seisin*.

So, upon office found, the sheriff may seize and take for the king the profits of the lands of aliens, idiots, or lunatics.

Of lands forfeited to the king for waste, or *cesser* for two years by the king's tenant.

By alienation in *mortmain*, or without licence.

By a condition broken, feoffment by collusion, &c.

So, where the king has year, day, and waste.

Or, seizure is made for a contempt.

In all cases, where an office is found before commissioners, and not the escheator, the sheriff shall be charged with the profits.

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But

But he shall be charged only for the annual value found by the office.
And if the office does not entitle the king to entry, but only to his action, the sheriff ought not to make seizure without warrant.

(D) Remedy against a Sheriff.

(D 1.) For Neglect of his Duty.

IF a sheriff refuses or neglects to do his duty, an action upon the case lies against him; as, if he does not return process returnable, or makes a false return. *Vide Action upon the Case for Negligence, (A 2.)—Return, (F 1.)*

[But where a *special* bailiff is nominated by the plaintiff or his agent, the sheriff is not bound to return the writ. 2 *Bl. Rep.* 952.]

So, if by his consent, or neglect, he suffers an escape, debt lies, or an action upon the case. *Vide Action upon the Case for Negligence, (A 2.)—Escape, (B 1, &c.)—Pleader, (2 P 1.)*

[But an action does not lie against the sheriff, on a promise to execute a bill of sale to the plaintiff's nominee; the legal and proper mode of compelling a sale by the sheriff, is by writ of *venditioni exponas*. *Cowp.* 406.]

And the court will not direct the sheriff, upon motion, what he ought to do. 2 *Mod. Ca.* 315.

Vide post. (F 2.)

(D 2.) For Misfeasance.

So, by the *st.* 3 *Geo.* 15. a sheriff shall not omit to tort any sum received of a debtor, and answer it in his account; and, if he *nihil* any money levied or received, &c. shall forfeit treble damages to the party aggrieved, and double the sum *nibilled*, &c.; to be decreed by the court in a summary way, &c.

By the *st.* 6 *Geo.* 21. *f.* 53. he shall not deliver blank warrants to attornies, &c. before a writ comes to him, on pain of 10*l.*

[The sheriff is liable *civiliter*, but not *criminaliter*, for the acts of his bailiffs; the meaning of which is, that he is not liable to be indicted or imprisoned, or subject to any corporal punishment for the acts of his bailiffs; but where it rests in damages, he shall make the party a pecuniary satisfaction. 2 *T. R.* 156. *Vide infra*, (F 1.)]

[If a bailiff on warrant on *fi. fa.* against *A.* takes the goods of *B.*, trespass *vi & armis* lies against the sheriff, even tho' he or his deputy does not recognize the act. *Saunderson v. Baker*, *T.* 12 *G.* 3. 3 *Wils.* 309.]

[So, also an action of trespass and false imprisonment lies against the sheriff for trespass and false imprisonment committed by his officers in the execution of process. *S. C.* 3 *Wils.* 317. *Vide Doug.* 40.]

[The sheriff is not liable for seizing goods in execution after an act of bankruptcy committed; but, if he sells them after the commission issues, trover lies. *Cooper v. Chitty*, *M.* 30 *G.* 2. 1 *B. M.* 20.]

[Actions for breach of duty of the office of sheriff, must be brought against the *high-sheriff*, tho' the breach was by the default of the under-sheriff or bailiff. *Cowp.* 403.]

[In an action of trespass against the sheriff for the wrongful act of the bailiff, it is not enough (in order to affect the sheriff) to prove him a general bailiff, and that he had given a bond of indemnity to the sheriff as such, together with proving the copy of the warrant, under which

which he entred and seized the plaintiff's goods; but the privity between such bailiff and the sheriff must be established in the particular transaction on the best evidence, by proving the original warrant of execution directed by the sheriff to such bailiff, or at least by proving such notice to produce it, as will, in case of non-production, let in secondary evidence of its contents. *Drake v. Sykes*, B. R. H. 37 Geo. 3. 7 T. R. 113.]

[Confession of an escape by the under-sheriff is evidence in an action against the sheriff, because he is the general servant of the sheriff. *Gabfley v. Doble*, B. R. E. 9 Will. 3. 1 Ld. Raym. 190.]

(E) What a Sheriff may or may not do.

(E 1.) In Person.

A Sheriff cannot do execution where he himself is a party; and therefore an extent by him, when he is conusee, will be void. *R. Mo. 547. Vide ante*, (C 1. 3.)

[And where he is plaintiff, a *latitat* directed to himself is ill. 1 B. Rep. 506.]

(E 2.) By his Officers.

A sheriff may make a warrant to his bailiff for execution of process, &c.

So, he may make a warrant to a special bailiff named to him by the plaintiff, and take security for his indemnity. *R. 1 Leo. 132. Cro. El. 271.*

But a special bailiff need not take the oath required by the *st. 27 Eliz. 12. R. Jon. 250. 2 Lev. 151.*

Nor, any other bailiff of a sheriff, who has not the return of writs. *Semb. Jon. 249.*

And he shall be intended a special bailiff, unless the contrary appears. *Semb. 2 Lev. 151.*

Yet a special bailiff, being allowed by the sheriff, will be an officer to the sheriff, who shall answer for an escape by such bailiff. *Jon. 65.*

And therefore, an *assumpsit* to pay such special bailiff more than the fees allowed by the statute, will be extortion, and void. *R. Jon. 65.*

[The under-sheriff himself may assign a bail-bond in the name of the high-sheriff, since *stat. 4 & 5 Ann.*, but the under-sheriff's clerk may not. *Kilson v. Fagg*, T. 3 G. Str. 60.]

(F 1.) What Fees he may take.

BY the *st. W. 1. 26.* no sheriff, or other minister of the king, shall take a reward to do his office, &c. *Vide Extortion*, (A 2.)

And by the *st. 4 Ed. 3. 9.* sheriffs shall receive and safely keep in prison thieves and felons, by delivery of the constables, without taking any thing for the receipt.

By the *st. 23 H. 6. 10.* no sheriff, under-sheriff, bailiff, &c. shall take any profit or avail of any person by them arrested or attached, or for letting to bail, or shewing favour, except *at infra*.

Nor, for making any return, or panel.

So, by the *st. 28 Eliz. 4.* sheriff, under-sheriff, bailiff of franchise,

or any of their officers, shall not directly or indirectly take, for an extent or execution of body, land, or goods, more than *ut infra*, on pain of treble damages to the party, and 40*l.*; a moiety to the king, and a moiety to him that will sue.

[And the sheriff is liable to treble damages in an action by the party grieved, for the act of his officer, in levying more than the fees allowed by this statute. 2 *T. R.* 148.]

[And there is little doubt but an action may also be maintained against him by a common informer, for the penalty. *Ibid.* by all the Judges in *B. R.*]

And therefore, for execution, or return of a *capias utlagatum*, or warrant thereon, no fee is due to the sheriff. *Per Cur. Litt.* 65.

So, by the *st.* 3 *Geo.* 15. no sheriff, &c. shall take any fee of a debtor to the king, &c. save 4*d.* for an acquittance. *Vide Extortion* (A 2.—E). And shall take poundage on a *ca. sa.*, &c. only for the sum remaining *bond fide* due, which shall be specified on the back of the writ, &c. on pain, as for extortion, &c. (*vide for this, Extortion* (A 2.—E), and 200*l.* besides; a moiety to the king, a moiety to him who will sue, &c.

But by the *st.* 23 *H.* 6. 10. sheriff may take for arrest 20*d.*, the bailiff 4*d.*, and gaoler, if committed to prison, 4*d.*, for a copy of a panel 4*d.*, for bail-bond 4*d.*

So, by the *st.* 28 *El.* 4. he shall not take for an extent or execution on body, lands, or goods, more than 12*d.* for every 20*s.*, where the sum exceeds not 100*l.*, and 6*d.* for every 20*s.* over and above an 100*l.*

And by this act he may take 12*d.* in the pound for the first 100*l.*, and 6*d.* per pound for every pound above 100*l.*; for it was not intended that he should take only 6*d.* per pound for the whole sum, where that exceeds 100*l.* *R. Cro. Car.* 287. *Dub. Cro. El.* 335. *Acc. Noy*, 28. 76. *R. Latch*, 17. 51. *Jon.* 307. *Vide* 2 *T. R.* 148.

If there be execution by *capias ad satisfaciendum*, the sheriff shall have his fees for the whole debt. 1 *Sal.* 331. *Skin.* 363.

So, in execution by *elegit*. *Dub.* 1 *Sal.* 331. *Per Holt*, 1 *Sal.* 333. *R. Sal.* 209.

Or, by *fieri facias*. *Skin.* 363.

[If a sheriff levy under a *fieri facias*, he is entitled to poundage; tho' the parties compromise before he sells any of the defendant's goods. *Alchin v. Wills*, *B. R. M.* 34 *Geo.* 3. 5 *T. R.* 470.]

[And, if either party, after such compromise, rule the sheriff to return the writ, the court will discharge that rule with costs, to be paid by the party obtaining it. *Ibid.*]

Tho' the writ be erroneous, he shall have his fees. *R.* 1 *Sal.* 332.

So, he shall have fees upon an execution of a judgment in a *scire facias*. 5 *Mod.* 97.

So, he shall have fees for money levied upon an extent out of the *Exchequer*.

So, if he levies a fine for a misdemeanor by process of *B. R.*, his poundage shall be allowed upon payment to the clerk of the crown. 2 *Jon.* 185.

And the sheriff himself shall have the fees for execution, not his bailiff. *Semb. Latch*, 19. 52.

And shall have the fees, tho' the execution be within a corporation; for

for the proviso of the statute extends to execution upon suits within a corporation, which is not a county of itself. *R. Latch, 51. Vide post. (F 2.)*

So, by the *st. 3 Geo. 15.* sheriff, bailiff of franchise, &c. may take, on executing an *habere facias possessionem*, or *seisinam*, 12*d.* for every 20*s.* *per annum* value of the lands not exceeding 100*l.* *per annum*, and 6*d.* for every 20*s.* *per annum* above that value.

So, by the *st. 8 Geo. 25.* no sheriff shall take for the extent and liberate, and *habere facias possessionem*, or *seisinam*, on the real estate, and levy on the personal estate by virtue of such extent, any more than the same fees that are appointed by the *st. 3 Geo. 15.* for executing an *elegit*, *habere facias possessionem*, or *seisinam*.

So, by the *st. 3 Geo. 15.* a sheriff, who shall levy a debt or other sum (except *post fines*) due to the king by process on the summons of the pipe or green-wax, by *levari facias* out of the court of *Exchequer*, shall have 12*d.* out of every 20*s.* for any sum not exceeding 100*l.*, and 6*d.* out of every 20*s.* for every sum above the first 100*l.* by him levied.

And, if the levy by process on a *fieri facias*, and extent out of any of the offices of the court of *Exchequer*, 18*d.* out of every 20*s.* not exceeding 100*l.*, and 12*d.* for every 20*s.* after the first 100*l.* levied.

Provided he answers the same on his account by the general sealing day of the term, wherein he ought to be dismissed the court, or by the time granted him for passing his account by warrant from one of the barons.

If the sheriff, having seized goods or personal estate by process, &c. for a debt to the crown, die, or be superseded before a *venditioni exponas*, or sale, the barons sitting, or any one, may apportion the fees and poundage between the preceding and subsequent sheriff.

[Sheriff is entitled to poundage on extents in aid; and if the money is paid, he is entitled to the whole poundage, tho' a *venditioni exponas* could not have issued till after he was out of office. *R. v. Jetberell, H. 30 G. 2. Parker, 177.*]

But he is not entitled to any other costs and charges. *Ibid.*

On action brought in *Exchequer* by sheriffs of *London* on bail-bond, taken in their own names for appearance of defendant, taken on *Exchequer* process on prosecution of attorney-general on behalf of the crown, for custom-house penalties and forfeiture, and *testatum ca. sa.* into *Hertfordshire* against bail, sheriff of *H.* is entitled to his poundage, for this is not the suit of the crown. *Lake v. Turner, M. 7 G. 3. 4 B. M. 1981.*

[By *st. 7 G. 3. c. 29.* he is not entitled to poundage for taking body in execution on process at the suit of sheriff, &c. on bail-bond for appearance of person sued for duties, or for penalty for smuggling, or in any case where he would not be entitled, if the suit was directly in the name of the crown.]

[By *st. 14 G. 3. c. 20.* prisoners acquitted or discharged by proclamation, shall be immediately set at large in court, without paying any fee; and treasurer of county, &c. shall, on judge's certificate, pay the usual fee, not exceeding 13*s.* 4*d.*

(F 2.) Remedy for his Fees.

By those statutes the sheriff has a right to, the fees allowed, and may

may maintain *assumpsit* upon a promise of payment. *R. Mo.* 468. *Cro. El.* 654. *R. cont.* 2 *Cro.* 103.

So, he may have debt. *Adm. Cro. Car.* 287. *R. 1 Sal.* 331. *Dub. Cro. El.* 335. *R. Noy,* 75. *Poph.* 173. *R. Latch,* 19. 52. *R. 1 Rol.* 598. l. 35. *Mo.* 853.

[An action brought on the 29 *El. c.* 4. for fees, must be brought by the sheriff himself, and not by his bailiff. 2 *T. R.* 155.]

But he cannot take a bond for his fees. *R. Cro. Car.* 287.

Nor, can he refuse to do execution till his fees paid. *R. 1 Sal.* 330.

And, if he refuses, he may be indicted for extortion. *1 Sal.* 330, 331.

Yet the court will not grant an attachment against him. *1 Sal.* 331.

Yet by the *st.* 28 *El.* 4. that act does not extend to fees to be taken for execution in a city or a town corporate.

And therefore, upon execution out of an inferior court in a city or borough, the sheriff, bailiff, &c. shall not have the fees allowed by that act. *R. Cro. Car.* 287. *R. 1 Sal.* 331. 5 *Mod.* 97. *R. Noy,* 76. *Poph.* 173.

So, it does not extend to an execution in a real action; and therefore the sheriff shall not have fees upon an *habere facias seisinam*, or *possessionem*. *R. 1 Sal.* 331.

But this is now remedied by the *st.* 3 *Geo.* 15. *Vide ante*, (F 1.)

So, it does not extend to execution upon voluntary engagements; as, a statute-merchant, recognizance. *R. 1 Sal.* 332.

But for execution of a judgment in a superior court, the sheriff, &c. shall have the fees allowed by the statute, tho' execution be done within a city or corporation. *R. Cro. Car.* 287. *R. 1 Sal.* 331. *R. Noy,* 76. *Latch,* 17. 51.

So, if a city, &c. be a county of itself, and execution be done by the sheriffs of the same county, they shall have their fees. *Noy,* 76. *Poph.* 173. *Semb. Latch,* 52.

So, a bailiff of a franchise shall have his fees. 5 *Mod.* 97. *Vide st.* 3 *Geo.* 15. *Dub. Latch,* 19. 52.

[The sheriff may retain his poundage out of money levied by *levari*, on an outlawry, ordered to be restored on giving security. *Semb. Rex v. Burrell, M.* 1731, *Bunb.* 305.]

[Sheriff may retain for his poundage, tho' there is no actual levy. *R. v. Jetherell, H.* 30 *G.* 2. *Parker,* 177.]

[And questions relating thereto are determinable on motion. *Ibid.*]

[On a writ of false judgment, if sheriff's fees are not paid, he may execute a writ *de executione judicii*. *Barnes.*]

(G) Sheriff's Account.

(G 1.) When it shall be made, and of what Things.

BY the *st.* 51 *H.* 3. *de Scacc.* all sheriffs, &c. shall make account to the treasurer and barons of the *Exchequer*, and shall come to the *profer* in the *Exchequer* the Monday after *Michaelmas*, and the *utis* of *Easter*, to pay their farms, rents, and issues, &c. and shall bring at the same time such monies as they have received of the summons of the *Exchequer*, and other the king's debts.

And give a recognizance, and make oath to make their account. *Mad.* 642. 662. *Vide ante*, (A 2.) And

And a writ of summons from the pipe, issued before *Michaelmas* and *Easter*, whereby the sheriff was commanded *quod sit ad Scaccarium in cras. S. Mich. et cras. clausi Pas. et haberet ibi quicquid debet de veteri firma vel nova, et debita subscripta.* Hale, Sh. Acc. 49.

By the *st. de Rutl.* 10 Ed. 1. (which was an act of parliament, 2 Inst. 551. 4 Inst. 114.) the body of the county shall be written in an annual roll *per se*, and read every year upon the accounts of sheriffs; the *remanents* of the *ferms* of the same shires shall be written *post terras datas* in the annual rolls, and the sheriffs shall be charged therewith. H. Sh. Acc. 65.

In the same annual rolls shall be written the *ferms* of the sheriffs, the profits of counties, the *ferms* of serjeanties and *assarts*, the *ferms* of cities, boroughs, towns, and other *ferms*, whereof answer is made yearly in the *Exchequer*. H. Sh. Acc. 65.

And, also all debts determined, all gross debts separate, and all other debts that seem to be clear. Mad. 654. H. Sh. Acc. 65.

If the sheriff does not make his *profer* as he ought, a writ goes, commanding him to make it. Mad. 645.

The annual revenue, for which a sheriff should principally account, was fixed or casual; the fixed was called the *corpus comitatus*; the casual, *proficuum comitatus*, which, being in ferm to the sheriff, were called *firma corporis comitatus*, and *firma de proficuis comitatus*. Hale, Sh. Acc. 34. Mad. 223. 651. 2 H. 7. 6. b.

The fixed annual revenue contained; 1. The rents of the tenants of the *demesnes* of the king; 2. Gross *ferms* of lands, not parcel of the county, let to farm to cities, boroughs, or particular persons, or reserved after the ferm of the county was ascertained; 3. Common fines upon towns for *beaupleader*, for suit, ward, not attending the tourn, &c. reduced to a certainty; 4. *Arrentations* of *assarts* in wastes and forests ascertained by justices in *eyre*; 5. *Crementum comitatus*, or improvements of the king's rents. Hale, Sh. Acc. 35, &c.

Some of these and several other rents, to be collected by the sheriffs, were written *sub nomine vic.*, and called *vicontiel* rents, and composed the ferm *corp. comitatus*. H. Sh. Acc. 37, &c.

The ferm *de proficuis comitatus* principally comprehended, 1. The fines, issues, amerciaments, and other profits of the county-court; 2. Of the tourn and leet of the sheriff; 3. Of the hundred or *wapen-take-court*. H. Sh. Acc. 43, &c.

These *ferms* were paid in blanch-money, (*viz.* reduced to the standard and *dealbat.*) or in *numero*. H. Sh. Acc. 24. 54.

Tho' the *debet* of a sheriff could not be known, till his account finished, yet an estimate was usually made of the annual revenue paid by him, and this sum was paid upon return of the writ of summons of the pipe at *Michaelmas* and *Easter*, which are called the *profers* of the *sheriffs*. H. Sh. Acc. 51. Mad. 648. 644.

And these *profers* are continued, but repaid, if nothing appears due from the sheriff upon the end of his account. H. Sh. Acc. 52.

By the *st.* 2 & 3 Ed. 6. 4. every sheriff, after he, his deputy, or attorney, is sworn to account for the profits of his office, shall deliver to such of the lord treasurer, chamberlain, chancellor, and barons, as shall be present, rolls of parchment, containing the sums he hath levied, or might have levied, as part of his ferm called

vicontiels, or any other ferm charged to him out of the court of *Exchequer*, of whom, for what lands, and for what cause levied.

By a rule 6th July 1650, it was ordered, that the clerk of the *pipe*, secondaries, and sworn clerks of the said office, shall set forth, in the subsequent annual rolls, the particular rents, as far as they can discover, &c. which make up the ferms charged in gross sums, and distinguish how much of them have been and are to be answered, *H. Sh. Acc.* 89. 94.

So, by the *st.* 13 & 14 *Car.* 2. 21. *f.* 4. the remembrancers, &c. shall write true copies of seizures and inquisitions, certified to the respective offices, for the engrosser of the great roll, &c. that process may issue for levying the same, &c. and they shall forthwith certify to such engrosser of the great roll all such debts as any sheriff shall be charged with by his return to the barons, on any *fieri facias*, *levari facias*, *capias*, or other process, and all fines and amerciaments, set in the court of *Exchequer* on any sheriff, &c. that they may be charged in the sheriff's account, &c. on pain of 40*l.*

(G 2.) Of what Things a Sheriff shall not be charged.

But by the *st.* of *Rutl'd*, 10 *Ed.* 1. in the *remanents*, the liveries and arms assigned shall be allowed, and other allowances (if the sheriff have had any) of the issues of bailiwicks by our writs. *Mad.* 239. 248. 650.

But the treasurer and barons shall have view, &c. and certify the chancellor of the due allowances to be made, and writs of allowance shall go according to such certificates.

In the account as to new debts, nothing shall be put in the annual roll but debts separate, or found in the original; but of dead ferms and desperate debts, another roll shall be made, called *rotulum comitatús*. *H. Sh. Acc.* 64.

And all debts, to which a sheriff may return, that the debtors have nothing in his bailiwick, nor had when first charged, or that the debtors be not found, shall be estreated into a roll, and delivered to circumspect men, who shall inquire thereof, as by the treasurer and barons shall be provided.

After this statute, the annual rents, which compose the *ferm corpus comitatús*, were examined, and abatement was made in the ferm of the sheriff, in respect of rents issuing out of lands granted by the king, and this was styled *remanentia firme post terras datas*. *H. Sh. Acc.* 66.

And the account was not made as before *de firma corporis comitatús*, but *de remanent firme post terras datas*. *H. Sh. Acc.* 66.

And out of the annual roll were also omitted, *firme mortua*, viz. that could not be levied, and debts separate. *H. Sh. Acc.* 67.

By the *st.* 5 *R.* 2. 13. if accomptants, examined by the barons on oath, if they can answer the king any thing, say, they cannot, they shall be discharged from other account.

And because, by subsequent grants, the rents, of which the ferm of a sheriff consisted, were abated, whereby the sheriff could not raise his ferm without grievance to the people, by the *st.* 1 *H.* 4. 11. it was enacted, that the sheriffs shall account in the *Exchequer*, and have allowance, on their oaths, of the issues of their counties in all times to come. *H. Sh. Acc.* 74.

But by the *st.* 4 *H.* 5. 2. these allowances on oath were restrained to things casual. *H. Sh. Acc.* 76.

So,

So, by the *st.* 34 *H. 8.* 16. sheriffs were to be charged on their accounts only with such sums as they might levy, and should have allowance not only for their charges in the diets, and charges of the justices of assize, but also their expences about the executing their offices. *H. Sh. Acc.* 78. *Recital in the st.* 2 & 3 *Ed.* 6. 4.

But by the *st.* 2 & 3 *Ed.* 6. 4. this act was repealed, yet it was thereby enacted, that sheriffs should have such tallies of reward and other allowances as they had before the making the said act, or account according to the said act at their election. *H. Sh. Acc.* 79.

And in counties, where no tallies of reward have been granted by the king, the sheriffs shall have allowances for their charges in the diet of the justices, or by other means, as shall be in a bill delivered on oath, without warrant or tally. *H. Sh. Acc.* 79, &c.

And shall be discharged of all farms, goods, profits, casualties, and sums of money, as they cannot levy or come by. *H. Sh. Acc.* 80.

And have deduction and allowance of all sums, where the possessions, out of which the *vicontiels* were leviable, are come to the king's hands, &c. And the lord treasurer and barons may do this without warrant.

Since this statute all sheriffs have waived their tallies of reward, and have in their accounts taken the benefits allowed by the *st.* 34 *H. 8.* 16. and 2 & 3 *Ed.* 6. 4. *Hale, Sh. Acc.* 82.

And have discharged themselves of their *vicontiels*, the *ferms de remanent. comitatús*, all *ferms de proficuis comitatús*, (where the profits did not exceed the charge,) the casual profits and other things which they could not levy. *H. Sh. Acc.* 82, 83.

And such discharge was made upon the oath of the sheriff, that he could not levy them. *H. Sh. Acc.* 83.

By a rule 6th July 1650, so much of the farms as cannot be explained by particulars, &c. and such particulars as have not been answered in forty years last, and are become illeviable, shall be put out of the annual roll of the accounts of sheriffs, &c. *H. Sh. Acc.* 95.

And by the *st.* 13 & 14 *Car.* 2. 21. *f.* 4. no sheriff shall be charged to answer in account any illeviable seizure, farm, rent, or debt, or where the process doth not expresse of whom, or of what lands, &c. or for what cause they are to be levied.

And all other dead farms and seizures, desperate, illeviable, and unintelligible debts, shall be left out of the great roll and sheriff's charge.

So, by the *st.* 3 *Geo.* 15. the lord treasurer and barons, or any two of them, as oft as they see fit, on request of the sheriff, &c. may call the treasurer's remembrancer, clerk of the pipe, and such other officers as they think fit, and cause them to bring before them an account of the rents and certainties, written out yearly in process to the sheriff, &c. and upon examination reduce and establish the sums with which the sheriff shall stand chargeable, &c. and make orders pursuant thereto, to be entred on record in the several offices, and the sums so settled shall be the *profers* of each county, and the rolls of *profers* shall be made conformable thereto.

(G 3.) How enforced to make his Account.

A sheriff ought to make his account in person, or by attorney. *Mad.* 658.

And

And his account shall be annual, and in a regular manner. *Mad.* 629.

But by the *st.* 3 *Geo.* 15. no sheriff or under-sheriff shall be taken into custody by any officer of the court of *Exchequer*, for not being apposed upon any process for not finishing his accounts, or for any contempt relating to his account, but by writ under the seal of the said court, or by warrant, signed by one of the barons, to be executed by the marshal of the said court, or his deputy, and particularly expressing the name of the sheriff, &c. and his offence.

(G 4.) How the Sheriff shall be discharged by *Quietus*.

When the sheriff has finished his account, he shall have his *quietus*.

By the *st.* 21 *Jac.* 5. and 13 & 14 *Car.* 2. 21. *f.* 8. when a sheriff, on passing his accounts, shall have his *quietus est*, he, his heirs, executors, lands, goods, &c. shall be absolutely discharged of all monies by him levied, tho' pretended not to be accounted for, or any other pretence notwithstanding, unless questioned, and judgment against him for the same in four years after his account or *quietus*.

And the officer, by whose default any process is sent out against him, &c. shall forfeit 40*l.*, &c.

By the *st.* 3 *Geo.* 15. if any officer, &c. retard a sheriff in passing his accounts, by wilful absence, &c. or, upon payment or tender of fees, shall neglect to enrol, make out, sign, and deliver his *quietus* in due time, he shall make such recompence as the barons shall direct, on complaint in a summary way, &c.

(G 5.) Charge of his Patent and Account.

By the *st.* 3 *Geo.* 15. the several officers of *Chancery*, *Exchequer*, &c. claiming any fee from any sheriff, under-sheriff, &c. for making out his patent or commission, the *dedimus* to swear him, the entering the recognizance, the making out and return of his process, his appeal, passing his accounts, *quietus*, or other matter concerning the sheriffalty, may receive the several fees therein specified, and no other, on pain of 5*l.* to the party grieved, and treble the sum taken above the just fees, and treble costs, to be awarded by the court of *Exchequer*, on proof of the offence, in such summary way as to them shall seem meet.

Vide more concerning *Sheriff*, in *County*, (B 1, &c.)—*Dignity*, (B 5.)—*Justices of Peace*, (D 6. 8.)—*London* (G.)—*Pleader*, (2 W 25.)—*Rent*, (D 8.)—*Return*, (F 1, &c.)

VISITOR.

(A) By whom Visitation shall be made.

(A 1.) By the King.

BY the antient law of the realm, the king has power to visit and reform all abuses in the church. *Dav.* 4. 2 *Rol.* 230. *l.* 7.

And therefore, all free chapels, of the king's foundation, are visitable by the king, and not by the ordinary. 2 *Rol.* 230. *l.* 17.

So,

So, all hospitals of the king's foundation. 2 *Rol.* 230. l. 17.

And all donatives. 2 *Rol.* 230. l. 20.

So, the king may visit the universities. *R. in Privy Council*, 12 *Car.* 1. 2 *Rush.* 327.

So, tho' the king appoints governors of an hospital, school, &c. he may afterwards visit, if the governors are not made visitors by express words. *Eq. Ca.* 182.

So, by the *st.* 25 *H.* 8. 21. archbishops or others shall have no authority to visit any college, hospital, &c. before exempt from their visitation, but visitation shall be by the king, &c.

But by the *st.* 31 *H.* 8. 13. all monasteries, colleges, hospitals, &c. thereby dissolved, and all churches, &c. belonging to them, tho' before exempt, shall be thenceforth within the visitation of the ordinary, or of the king, &c.

So, where the king and a subject join in a foundation, the king shall visit; for the king is founder. 2 *Inff.* 68.

(A 2.) *How he visits. By his chancellor.*] The visitation of the king's free chapels, hospitals, or donatives, shall be by his chancellor. *F. N. B.* 42. *A. Dav.* 46. b. 2 *Rol.* 230. l. 17. 20. 45. *Co. L.* 96. a.

And if any other visits them, a prohibition lies. *Reg.* 40. b.

(A 3.) *By commissioners.*] So, the king may make visitation by special commissioners. *Dav.* 46. b. 2 *Rol.* 230. l. 24.

By the *st.* 25 *H.* 8. 21. archbishop, or other person, shall have no power to visit any colleges, hospitals, &c. exempt before the act; but the visitation shall be made by commission under the great seal to such persons as requisite.

By the *st.* 1 *El.* 1. all privileges, jurisdictions, &c. use to visit the ecclesiastical estate and persons, &c. shall be annexed to the crown; and the queen may assign commissioners, &c. to have all jurisdiction, &c. *Vide in Prærogative*, (D 9.)

By the *st.* 2 *H.* 5. 1. hospitals of the king's patronage and foundation, the ordinaries, by the king's commission, shall inquire of the foundation, governance, and estate of them, &c. and shall certify the inquiry in *Chancery*.

(A 4.) By a Patron.

So, if any foundation for charitable purposes be made by a subject, and no special visitor appointed, the founder and his heirs, by the common law, are visitors. 4 *Mod.* 124. *Ca. Parl.* 45. 8 *Aff.* 29. *Eq. Ca.* 180.

As, the founder of a college or hospital, not spiritual. *Ca. Parl.* 46. *Bro. Deposition*, 10. 2 *Rol.* 230. l. ult. *Reg.* 41. a. *Noy*, 91. 2. *Dub. Cod. Jur. Eccl.* 1148. (or 1107. ed. ult.) *R. Carth.* 93.

So, if governors be appointed, but no visitor, the governors shall visit. 2 *Rol.* 231. l. 2. 10. 10 *Co.* 31. a.

By the *st.* 14 *El.* 5. if an hospital be founded, and no visitor appointed, the founder shall visit during his life.

So, by the *st.* 39 *El.* 5. where *maisons de Dieu*, &c. are founded by charter.

So, the patron or founder of any eleemosynary corporation. *Ca. Parl.* 45.

So,

So, if a common person be founder, tho' the king afterwards gives to the same corporation greater possessions. 2 *Inft.* 68.

Or, translates a chauntry, founded by a common person, to a monastery, &c. and endows it. *Ibid.*

So, the founder or patron of any eleemosynary foundation, and his heirs, are visitors, tho' the patron does not claim to be so during his life. *Ca. Parl.* 45.

And this visitatorial power is consequent to the patronage by the common law, not introduced by any canon or ecclesiastical constitution, *Ca. Parl.* 45.

So, the visitation of a donative church shall not be by the ordinary, but by the patron or commissioners appointed by him. *Co. L.* 344. a. *Vide Donative.*

(A 5.) By the Metropolitan.

So, the archbishop of *Canterbury* may visit the universities of *Oxford* and *Cambridge*, being within his province, *jure metropolit.* *R. by the King in Council*, 12 *Car.* 1. 2 *Rush.* 327, &c.

(A 6.) By the Ordinary.

(A 6.) *Who subject to his visitation.*] All spiritual persons, generally, are subject to the visitation of the bishop, or other ordinary. 2 *Rol.* 229. l. 10.

As, parson, vicar, &c. 2 *Rol.* 229. l. 35.

So, a dean, of right is visitable by the ordinary. 2 *Rol.* 229. l. 25.

So, every one having *curam animarum*. 1 *Mod.* 12.

By the *st.* 2 *H.* 5. 1. as to hospitals not founded by the king, the ordinary shall inquire of the manner of foundation, estate, and governance, &c. and correct and reform, &c. according to the law of holy church, as to them belongs.

So, every spiritual hospital shall be visited by the bishop. 2 *Rol.* 230. l. 50. 10 *Co.* 31. 2 *Rol.* 231. l. 5. *Noy*, 91, 2.

So, all abbeys and priories, of common right, were visitable by the ordinary; as, to their rule and ordinary, if they were not lawfully exempted. 2 *Rol.* 229. l. 17. 231. l. 3.

And by the *st.* 35 *Ed.* 1. 4. the ordinary, tho' an abbot, prior, &c. alien, may visit a monastery, &c. subject to them in things belonging to the rule and discipline of their order.

And tho' the patronage of a deanry, &c. by act of parliament, be given to the king, saving to all but the bishop all rights, &c. the dean continues visitable, when the king has presented; for the saving regards the patronage and possessions only. 2 *Rol.* 229. l. 30.

So, if an hospital be suppressed by act of parliament, and their possessions vested in the king, the visitation of them does not thereby cease, till the incorporation of them be dissolved. 2 *Rol.* 229. l. 40.

So, by the *stat.* 14 *El.* 5. after the death of the founder, if no visitor be appointed, the bishop of the diocese, or his chancellor, shall visit all hospitals within his diocese, to see that they be ordered according to the statutes of the foundation; and call to account all persons for receipt of rents, &c.

(A 7.) *Who not.*] But the king's free chapels, hospitals, donatives, &c. were not visitable by the ordinary. *Vide ante*, (A 1.)

So,

So, the king might exempt abbies, &c. from the visitation of the ordinary. 2 *Rol.* 232. l. 35. 230. l. 25.

So, if the king had it in ward, the ordinary should not visit during the king's custody. *Semb.* 2 *Rol.* 230. l. 35.

So, if a rectory was appropriated to the abbot, &c. it ceased to be visitable by the ordinary. 2 *Rol.* 229. l. 12. *Dav.* 3. b.

So, if a corporation be lay, the ordinary ought not to visit, nor can visit. 10 *Co.* 31. a. *Sutton. Dub. Cod. J. Eccl.* 1148. (or 1107. ed. ult.)

[Whether a bishop, as visitor, has jurisdiction in matters of property in his cathedral, (as the intermediate profits of a vacant prebend, divided among the other prebendaries during the vacancy,) or whether they can be determined otherwise than by course of law, is a great question; but if executors and administrators of deceased prebendaries intervene, he certainly has no jurisdiction. *Rex v. Bishop of Durham*, P. 31 G. 2. 1 B. M. 567.]

(A 8.) *How the visitation shall be made. By the bishop himself.*] By *Const. Otho.* Leg. 22 H. 3. A. D. 1237, *Circumeant (Arch. et Episc.) diœceses suas temporibus opportunis, corrigendo et reformando ecclesias. Vide Lind. Const. Oth.* 56.

In visitatione diœcesanâ, tenetur episcopus primo visitare ecclesiam cathedralen, deinde diœcesin. Cod. J. Eccl. 996. (or 957. ed. ult.)

In metropolitânâ, tenetur archiepiscopus suam primùm ecclesiam et diœcesin visitare, deinde in singulis diœcesibus ab ecclesiâ cathedrali incipere, indeque pro libitu ad reliquas diœceseos partes transire. Cod. J. Eccl. 996. (or 957. ed. ult.)

And visitation shall be made without commission for it under the great seal. 2 *Rush.* 451.

Visitation by the bishop, by the antient law, ought to be annual. *Cod. J. Eccl.* 998. (or 958. ed. ult.)

But because the archdeacon makes an annual visitation, by the modern law and practice, the bishop makes only a triennial visitation, *diœcesim totam tertio quoque anno visitet et procuraciones accipiat, ut aliis temporibus visitet, ei liberum esto, modo suis impensis id faciat. Cod. J. Eccl.* 998. (or 958.)

By canon 60. A. D. 1603, confirmation shall be at the bishop's visitation every third year.

(A 9.) *By the archdeacon.*] *Visitationem per modum scrutationis simplicis tanquam vicarius episcopi archidiaconus habet de jure communi. Lind.* 49.

(A 10.) *Offences inquirable at a visitation.*] *Ad episcopum principaliter spectat inquirere de criminibus ecclesiasticis, ut de adulterio, usura, sacrilegio, simoniâ, et quolibet mortali peccato. Lind. Const. Otho.* 56.

By canon 109. A. 1603, if any offend their brethren by adultery, whoredom, incest, or drunkenness, by swearing, ribaldry, usury, or other uncleanness and wickedness of life, the churchwardens shall present the offenders.

So, by canon 110. if they know any to be a hinderer of God's word to be read or preached, or of the execution of those constitutions, or fautor of usurped or foreign power, by law rejected, or defender of popish and erroneous doctrine.

So,

So, by canon 111. in all visitations they shall present the names of all who behave disorderly in the church, or, by ringing, walking, talking, or other noise, hinder the minister or preacher.

[The visitor may deprive a prebendary for incontinency. i *Wils.* 206.]

(A 11.) *By what means inquiry shall be made. By presentment.*] Anciently such persons as the ordinary selected were cited to make information, upon oath, *de moribus parochianorum* within their district. *Cod. J. Eccl.* 1000. (or 960. ed. ult.)

Afterwards a citation was granted against 4, 6, or 8 *juxta amplitudinem parochiarum, quod compareant, &c. super inquirendis ab eisdem visitationem nostram, &c. concernen. veritatem quam noverint dicturi, &c.* who by the canon law are styled, *Testes Synodales.* *Cod. J. Eccl.* 1000. (or 960.)

And by the *Const. of Boniface*, 45 H. 3. A. 1261. *laici, ubi de subditorum peccatis et excessibus corrigendis per praelatos et judices ecclesiastic. inquiritur, ad præstand. de veritate dicendâ jurament. per excommunicationem, si opus fuerit, compellantur.* *Lind.* 109.

Afterwards, at the time of the reformation, and before, presentment was made by the churchwardens alone, or with two, three, or more parishioners. *Fide dignis* (who since are called *fide-men*, or assistants). *Cod. J. Eccl.* 1000. (or 960.)

And by the canon 1571, *aditui adulteros, fornicarios, &c. in episcoporum & archidiaconorum visitationibus patefacient.* *Cod. J. Eccl.* 1000. (or 960.)

And therefore, the bishop or archbishop before his visitation *hos œconomos ad comparend. in eorum visitatione vocare solent, eisq; articulos ministrare, ac eos de fidelit. super eisdem inquirend. et de compertis præsentationem exhibere, juramento corporali onerare.* Ought. *Ordo Jud.* 228.

By canon 26. A. 1603, churchwardens or fide-men having taken their oaths to present, &c. who shall incur perjury by neglecting or refusing to do so, &c. shall not be admitted to communion.

The oath of churchwardens was at first *ad patefaciend.* what they knew to be bad *in rebus et personis*; but articles were delivered to them, and they were sworn to make presentment upon them. *Cod. J. Eccl.* 1000. (or 960.)

But if an oath is required to present according to articles delivered, where any articles are not within ecclesiastical jurisdiction, a prohibition goes; for the oath required ought to be only, *to present such articles as to their knowledge were presentable by the ecclesiastical laws.* *Cod. J. Eccl.* 1001. (or 961. edit. ult.)

So, a presentment *quod A. commisit adulterium, &c.* is insufficient without saying *cum quâ.* Ought. O. J. 229.

(A 12.) *By inquiry ex officio.*] So, a bishop or archdeacon, *ex famâ publicâ vel relatione person. fide dign.*, having notice that any has committed a notorious crime, or is suspected *de opinione erroneâ aut perversitate obstinatâ*, may cause him to be cited *ad comparend. personaliter coram eo in loco solito judiciali articulis, &c. præsertim to the crime specified, sibi objiciendis responsur.* Ought. O. J. 215.

(A 13.) *By promotion or accusation of a stranger.*] So, if there be no

no presentment, nor inquiry *ex officio*, *qualibet persona* (able to pay costs) *habet interesse judicis officium implorare et voluntarie promovere*. Ought. O. Jud. 225.

(A 14.) By a special Visitor.

So, upon the foundation of any corporation aggregate for a charity, the founder may constitute a special visitor. *Co. L. 96. a.*

As, upon the foundation of any college, or hall in an university.

Or, hospital, free-school, &c.

[No particular words are required to create a visitor; it is sufficient if the founder's intention appears. *Attorney-General v. Talbot*, H. 1747, 3 *Atkyns*, 662. 1 *Vesey*, 78. *Attorney-General v. Middleton*, T. 1751, 2 *Vesey*, 327.]

[The visitatorial power may be divided. *Ibid.*]

[Governors may be visitors, tho' the legal estate is vested in them; but not when they are to receive the revenue. *Ibid.*]

[The founder may appoint a special visitor, for a particular purpose, and no further; he may appoint a general visitor, and yet appoint inferior particular powers to others in the first instance. *Saint John's College, Cambridge, v. Toddington*, H. 30 G. 2. 1 *B. M.* 158.]

And where there are such special visitors, governors or overseers, by the *st. 39 El. 6.* they are not subject to the commissioners for charitable uses.

[If a college has, by charter, particular powers as to a school; as, to remove the master, &c. Chancery will not interfere in such matters, tho' they are not appointed general visitors; but as to management of the revenue, it will. *Attorney-General v. Corporation of Bedford*, T. 1754, 2 *Vesey*, 505.]

If a bishop, by the designation of *the bishop of such a see*, be appointed visitor, that extends to all bishops of the same *see*; as, if the statute of a college say, *episcopus eliensis sit visitor*. *Semb. F. g. 312. 380.*

(A 15.) *What authority he shall have.*] If a special visitor be appointed, he has a general authority to inspect, that the college, &c. be governed according to the laws and statutes of the founder. 4 *Mod. 110.*

And may make visitation for redress of grievances. 4 *Mod. 109.*

[But a visitor can only decide private disputes between the members of the college, and not a suit by third persons against the whole body. *Corp. 378.*]

[So, where an estate is in the college, and they are to act in a trust, the visitor cannot meddle in a matter which is the subject of such trust. *Id. ibid.*

So, tho' the statutes of a college say, that he shall visit *de quinquennio in quinquennium semel*, yet he may at other times hear appeals, remedy upon complaint, &c.; for his general authority shall not be restrained but by negative words. *Semb. 4 Mod. 109. Ca. Parl. 42.*

So, a visitor has authority, upon refusal to admit, as well as upon ejection of, a fellow, &c. of a college. 4 *Mod. 369. Skin. 13.*

So, a visitor has authority, as incident, to deprive. 4 *Mod. 110. Ca. Parl. 43.*

To

To proceed upon a grievance done in the time of his predecessor.
R. Skin. 13.

[If there is a visitor of a college, his authority extends to fellowships and scholarships, *there to be placed* by a subsequent charity. *Attorney-General v. Talbot, H. 1747, 3 Atkyns, 662. 1 Vesey, 78.*]

[Tho' the founder has given a college a visitor, yet, as to a separate benefaction given them in trust, they are subject to the jurisdiction of Chancery as trustees. *Green v. Rutherford, P. 1750, 1 Vesey, 462.*]

[Subsequent benefactions may be put under the power of the visitor, or not, at the will of the donor. *Ibid.*]

[A party's answering to an appeal before the visitor, does not give him jurisdiction, if he has it not otherwise. *Ibid.*]

[Visitor can judge only according to the statutes of the college. *Ibid.*]

[Therefore in cases in which the visitor cannot give a remedy, the relief belongs to the king's courts of general jurisdiction. *Ibid.*]

[Petition to the lord chancellor, as visitor of *Trinity-Hall, Cambridge*, there being no heir of the founder, to declare the election of a fellow void, and to order the petitioner to be admitted: the court of King's Bench having in a similar case declined jurisdiction, the lord chancellor heard the petition, and on the construction of the statute dismissed it. *Ex parte Wrangham, 2 Ves. jun. 609.*]

[The founder may prescribe particular modes and manners, as to part. *St. John's College, Cambridge, v. Toddington, H. 30 G. 2. 1 B. M. 158. Vide 1 Bl. Rep. 51. 71. 82. 89.*]

[The power of a visitor must be collected from the whole purview of the statutes considered together. *Ibid.*]

[Tho' a general visitor has incidental power, yet the founder may restrain him as to particular instances. *Ibid.*]

[The bishop of *Ely* is general visitor of *St. John's College, Cambridge*, except as to altering the statutes. *Ibid.*]

[He is visitor as to the election of fellows, as well of doctor *Keton's* (or the *Southwell*) fellows as the rest. *Ibid.*]

[Ingrafted or annexed fellowships (tho' ingrafted by indenture) are to be considered as part of the old foundation, if no statutes are given by the founder of them. *Ibid.*]

[A clause of distress given to a third person, does not take away the specific remedy of the injured person's applying to the visitor. *Ibid.*]

(B) Determination of a Visitor final.

SO, if a visitor gives sentence, it shall be definitive; for no appeal lies to the king, or elsewhere. *4 Mod. 112. R. Dy. 209. a. R. 3 Mod. 265. Skin. 13. [Vide 1 Bl. Rep. 22. 25.]*

And therefore, if his sentence or deprivation be shewn in pleading, it is not necessary to say for what cause it was; for the cause is not traversable. *4 Mod. 124. Ca. Parl. 46. 53.*

So, a *mandamus* does not lie to restore a person deprived by him. *4 Mod. 112. 122. Ca. Parl. 47. R. 3 Mod. 265.*

[Where it is doubtful who is the visitor of a college, a *mandamus* shall not go, nor has it ever been determined whether a *mandamus* lies to a visitor. *1 Wils. 266. Vide 1 Bl. Rep. 52. 71. 82.*]

[If

[If the visitor of a college in one of the universities refuse to exercise his visitatorial power by receiving and hearing an appeal, B.R. will grant a *mandamus* to compel him; but if he has heard and decided on it, this court has no authority to examine the legality of the judgment. *Rex v. Ely*, H. 34 Geo. 3. 5 T. R. 475.]

So, his sentence shall not be examined in a collateral action. *Cont. per three J. but Holt Ch. J. acc. 4 Mod. 113. 123.*

And this judgment was reversed in parliament. *Ca. Parl. 56. Skin. 447—516.*

No more in a temporal than in a spiritual corporation of which he is visitor. *Cont. per three J. but Holt acc. and the judgment was reversed. 4 Mod. 116. 121. Ca. Parl. 56.*

But the power of a visitor may be qualified or restrained by the statutes of the college. *Semb. 4 Mod. 120. Ca. Parl. 51. [Vide the Case of Rex v. Bishop of Ely, 2 T. R. 290, et seq.]*

So, if he, who is no visitor, attempts a visitation, a prohibition lies. *4 Mod. 110. Semb. 2 Rol. 230. l. 15. 27.*

So, if a visitor be appointed by the founder of a college, that does not extend to a foundation of other fellowships added by another to the same college. *Semb. 5 Mod. 422.*

So, if a visitor intermeddles with a matter out of his jurisdiction, a prohibition lies. *Ayl. vol. 2. Hist. of Oxford, 80. 94. Reg. 40.*

So, an appeal lies to the king himself from the sentence of a visitor. *Ayl. Hist. of Oxford, vol. 2. 84. 86.*

(C) How his Power shall be exercised.

THE power of a visitor must be regulated according to the statutes of the college, or customs of the place.

If an appeal be exhibited to him, he must take it. *Ayl. H. of Oxford, vol. 2. 81.*

He must inhibit all proceeding against the appellant till the appeal be determined. *Ibid.*

He must direct the complaint, to which an answer is required, to be put in writing. *Ayl. vol. 2. 95.*

[He need not hear *parol evidence* on an appeal; it is sufficient if he receive the grounds of the appeal and the answer to it in writing. *Rex v. Ely*, H. 34 Geo. 3. 5 T. R. 475.]

So, he must summon all concerned to appear before him. *Ayl. vol. 2. 81.*

And he may suspend or deprive any for contumacy; for it is requisite for the exercise of his office. *Ayl. vol. 2. 80. 4 Mod. 110. Ca. Parl. 43.*

So, he may administer an oath. *Ayl. vol. 2. 94.*

Or, require an answer upon oath. *Ibid.*

He ought to give convenient time for an answer. *Ayl. vol. 2. 95.*

And for examination of witnesses. *Ibid.*

He must always proceed upon a general visitation, or particular appeal, *summariè, simpliciter, & de plano sine strepitu aut figura judicii*, viz. according to mere law and right. *Ibid.*

Yet the forms prescribed by the statutes must be observed. *Ibid.*

[He may inquire of facts committed before an act of grace.]

[He may inquire into and punish *one*, for a corporate act.]

[The bishop of *A.* and his successors, being appointed visitors, *is* vests in the successors, without the words *for the time being.*]

[If he is first appointed general visitor, and afterwards is appointed special visitor, and proceeds as special visitor, a prohibition will lie; for the crown had no further power to enlarge the visitatorial power. *Bentley v. Bishop of Ely*, T. 5 G. 2. Fort. 298. Str. 912.]

[*N.B.* This judgment was reversed on error in the House of Lords.]

[A general visitor cannot have a *mandamus* to help him to visit his college, nor to compel an inferior officer to do his duty. *Doctor Walker's case*, H. 9 G. 2. B. R. H. 212.]

(D) Remedy, if a Visitor acts contrary to Law.

BUT a visitor has not authority to determine matters against the statutes of the realm; for he is a private judge, who is to determine only offences against the statutes of the college where he is visitor. *Semb.* 4 Mod. 238. 241. 369.

(E) If he acts without lawful Authority.

SO, if a visitor acts when he has no right to be visitor, a prohibition lies. 2 Mod. Ca. 367.

[If no person applies to the court, who claims the visitatorial power, except one who has long exercised it, the court will not grant a prohibition on the motion of a single fellow, who suggests that the power is in another. *Martyn v. Archbishop of Canterbury*, T. 11 & 12 G. 2. Andr. 258.]

U M P I R E.

Vide Arbitrament (F).

U N C O R E P R I S T.

Vide Pleader, (2 X 5.)

U N D E R - S H E R I F F.

Vide Pleader, (2 S 21.)—Viscount, (B 1.)

U N I O N.

Union.

AS to the union of churches, by whom it shall be made, and the effect of it, *vide in Advocatfon*, (F 1, &c.)

As to the union between the kingdoms of *England* and *Scotland*, *vide in Scotland*, (D 1, &c.)

As to the union of *Wales* with *England*, *vide in Wales*, (A 1.)

The usual union of kingdoms or states consists in the union of sovereignty, of name, of language, of laws, and occupations.

&

Si uniantur duo populi, non amittentur jura, sed communicabuntur.
Gro. de J. Bel. & Pac. l. 2. c. 9. f. 9. Cont. 4 Inst. 347.

U N I T Y.

Vide Difines, (E 9.)

U N I V E R S I T Y.

(A) Universities ; What are.

IN the kingdom of *England* there are only the two universities of *Cambridge* and *Oxford*.

Universitas imports the incorporation of the professors of all sciences in a body politic. *Dr. Ayliffe, 2.*

And frequently is used for the place in which those professors reside for their studies. *Dr. Ayliffe, 2.*

The word was used in such sense in the time of *Rich. 1.*, *John*, and most part of the time of *H. 3.* *Dr. Ayliffe, 2.*

The king may make a university.

And may make it without the consent of the ordinary. *2 Keb. 65.*

[The corporations of universities are lay-corporations, and the crown cannot take from them any rights they have by charter or prescriptive usage. *Rex v. Vice-Chancellor of Cambridge, P. 5 Geo. 3. 3 B. M. 1647.*]

(B) Cambridge; the Privileges.

THE antient charters of *Cambridge* being destroyed by the rebels, *per ft. 8 R. 2. nu. 11.* the assise, conuſance, and correction *panis, cervisia, ponder., mensur., regrator et forestallor.*, were granted to the chancellor and scholars of the same university. *4 Inst. 228.*

By *ft. 13 Eliz. 21.* it was enacted that the university of *Cambridge* should be incorporated, tho' it was antiently a corporation. *4 Inst. 227.*

That the letters patent of *3 Eliz.*, and all letters patent of the queen or her predecessors, should be as good and effectual as if they had been recited and confirmed by the same act. *4 Inst. 227.*

That the chancellor, masters, and scholars of the same university should enjoy all manors, franchises, privileges, &c. to them granted, &c. *4 Inst. 227.*

[The charter of *Eliz.* does not repeal the old customs and usages of the university; except in cases where they choose it; they may act partly under one, partly under the other; and an election according to usage is good, tho' a subsequent charter directs another mode. *Rex v. Vice-Chancellor of Cambridge, P. 5 G. 3. 3 B. M. 1647.*]

[Court-leet, tho' antiently granted to the town, is now in the possession of the university. *Semb. ibid.*

[By letters patent, *26 H. 8.* and *3 Car. 1.* it has a concurrent authority to print acts of parliament, and abridgments of them, within the university. *Basket v. University of Cambridge, M. 32 Geo. 2. 2 B. M. 661.*]

As to the courts of the universities, *vide in Courts (M)*.

As to the conufance of pleas there, *vide Courts, (M—P 2. 4.)*

(C) Oxford; the Privileges.

SO, by the *ft. 13 Eliz. 21.* all charters and letters patent, &c. by the queen or her predeceffors to the univerfity of Oxford, as well as to Cambridge, are confirmed; the univerfity is incorporated *de novo*, and all manors, franchises, privileges, &c. which they of right ought to have, are eftablifhed. *4 Inft. 227.*

The chancellor of the univerfity is a juftice of peace by prefcription, as well as by charter. *2 Vent. 33.*

By antient charters they have jurifdiction *tam in laicos quam in clericos.* *2 Vent. 33.*

So, by *ft. 14 R. 2.* and *14 H. 8.* confirmed by *ft. 13 Eliz. 21.* the univerfity has conufance of all pleas for trefpafs, and all complaints, mifdemeanors and crimes (except pleas of freehold) *ubi fcholares, fervi aut miniftri funt una partium fec. ftatuta vel confuetudines, &c. vel fec. legem regni ad voluntatem cancellarii; ita quod juftic. de B. R. de C. B. vel de affizis non fe intromittant. Vide Courts (M).*

And therefore, where a fcholar is party, the vice-chancellor's court fhall hold plea in all perfonal actions *fec. legem terræ, aut morem univerfitatis.* *Litt. 10. 1 Sal. 343.*

So, if the wife or daughter of a fcholar is plaintiff againft another fcholar who prays a prohibition; for tho' the wife is not a fcholar or fervant, yet the defendant being a fcholar, the fuit ought to be in the vice-chancellor's court. *R. Cro. Car. 73. Litt. 41.*

So, conufance fhall be allowed, where an action upon the cafe is brought againft a college in their corporate capacity, *viz.* againft mafter and fellows. *R. per three J. Atkins cont. 1 Mod. 164.*

But the univerfity court fhall not hold plea in an action real.

Nor, in ejection; for thereby poffeffion of the freehold fhall be recovered. *R. Cro. Car. 88.*

Nor, in trefpafs *quare claufum fregit*; for the freehold may come in queftion.

Nor, for the penalty of a ftatute. *Skin. 665. R. Sal. 671.*

So, privilege of the univerfity will not be allowed where the fuit is for an equitable matter in Chancery. *R. 2 Vent. 362. Vide in Chancery (3 X).*

Nor, where a tradesman is matriculated and regiftered in the univerfity as a fervant to a fcholar, but lives in the city, and does not attend in college as a fervant. *R. 2 Vent. 106.*

[Conufance is not allowed for one who tho' ftill a member, and fometimes is at Oxford, yet is a curate elfewhere, and refides there generally. *Hayes v. Long, T. 6 G. 3. 2 Wilf. 310.*]

[The chancellor fhould certify refidence, and there fhould alfo be an affidavit of it. *Semb. ibid.*]

If the privilege of the univerfity is allowed upon record in the fame court, it fhall be afterwards allowed upon motion in another cafe; but otherwife, it muft be pleaded. *Sal. 450. Skin. 665.*

[A college barber at Oxford, tho' he refide in the city, is entitled to the privileges of the univerfity. *Rex v. Routledge, M. 21 Geo. 3. Dougl. 531.*]

[By

[By *stat. 17 Geo. 2. c. 40. §. 11.* no person shall retail wine in either university without licence from the chancellor or vice-chancellor of *Oxford*, or the chancellors, masters, and scholars of *Cambridge*, respectively, on pain of 5 *l.* But this is not to affect the privileges of the mayor, &c. of *Oxford*.]

School and Schoolmaster.

BUT by *const. Tho. Arundel in conc. Oxon, H. 4. magistri, &c. docentes in artibus aut grammaticâ pueros, &c. de materia aliqua theologicâ contra determinata per ecclesiam, nullatenus se intromittant instruendo eosdem, nec permittant scholares, &c. de fide, &c. disputare, ne per ordinarium gravit. puniantur. Lind. 283.*

So, by *§. 23 El. 1.* a schoolmaster or teacher presuming to teach contrary to this act, (*viz.* who absents from church for a month, or is not allowed by the bishop or ordinary of the diocese,) being convicted, shall suffer a year's imprisonment, without bail, and be disabled to be a teacher of youth.

And he who keeps such a schoolmaster shall forfeit for every month 10 *l.*

So, by the *§. 1 Jac. 4.* no person shall keep a school out of the universities, except in some public or free grammar-school, or in some gentleman's house, not recusant, or licensed by the archbishop or bishop of the diocese, on pain of 40 *s. per day, &c.*

So, by *§. 13 & 14 Car. 2. 4.* every schoolmaster of a public or private school, &c. shall subscribe the declaration therein; and if any teach, as a tutor or schoolmaster, before licence from the archbishop or bishop of the diocese, &c. or before such subscription, (but subscription, only as to his conformity to the liturgy, is now taken away by *§. 1 W. & M. 8. and 5 Geo. 6.*) he for the first offence shall have three months imprisonment; for the second the like, and forfeit five pounds,

By *§. 17 Car. 2. 2.* it shall not be lawful to teach any public or private school, unless he first subscribe the oath against taking up arms, &c. and frequent divine service, on pain of 40 *l.*

By *§. 12 Ann. 7.* he shall subscribe declaration to conform, &c. have licence, &c. receive sacrament in a year before, take the oaths, and subscribe declaration against transubstantiation, and not afterwards resort to conventicle, &c. But this is now repealed by *stat. 5 Geo. 6.*

By *§. 5 El. 1.* every schoolmaster, public or private teacher of children, shall take the oath of allegiance.

By *§. 7 Jac. 6.* he shall take it before the bishop of the diocese or ordinary in open court.

By *§. 1 W. & M. 8.* instead of the former oaths, the oaths thereby prescribed.

By *§. 13 & 14 W. 3. 6. 1 Ann. 22. & 1 Geo. 13.* he shall take the oaths of allegiance, supremacy, and abjuration.

The *§. 23 El. 13 & 14 Car. 2.* extend to an usher, or other assistant to a schoolmaster.

And if a suit is instituted in the ecclesiastical court for keeping a school without licence, a prohibition lies. *Dub. Sal. 672. R. Carth. 464. 5.*

UNLAWFUL ACT.

Vide Justices, (M 10.)

VOLUNTARY BOND.

Vide Chancery, (4 D 22.)

VOLUNTARY CONVEYANCE.

Vide Chancery, (2 T 9. 16.—3 M 5.)

VOLUNTARY SETTLEMENT.

Vide Chancery, (3 N 5.—4 H 9.)

VOTING IN PARLIAMENT.

Vide Parliament, (C 26, &c.)

V O U C H E E.

Vide Estates, (B 29.)—Voucher, (D 1, &c.—E—F—1, 2.)

V O U C H E R.

(A) Voucher.

(A 1.) In what Actions it lies.

VOUCHER lies in real actions, where the tenant vouches such an one, who is bound to warranty, to defend the right against the demandant, or to render in value. *Co. L. 101. b.*

It lies in all real actions for recovery of land, except *assise*. *Vide infra.*

In right of a ward. 2 *Rol.* 744. l. 47.

In right of advowson. 2 *Rol.* 745. l. 3.

So, in a writ of admeasurement of pasture. 2 *Rol.* 745. l. 29.

But in *assise* the tenant cannot vouch; for it is *festinum remedium*. 2 *Rol.* 745. l. 21.

Nor, in a writ of entry in the nature of an assise; for it is contrary to the supposal of the writ. 2 *Rol.* 745. l. 25.

So, in partition the defendant cannot vouch. 2 *R. Mo.* 21.

Nor, in dower against the heir. 2 *Rol.* 745. l. 14.

Or, *quod ei deforciat* for recovery of land, claimed as dower; for it is in the nature of dower. 2 *Rol.* 744. l. 42.

Nor, in a *quare impedit*, for danger of a *lapse*. 2 *Rol.* 744. l. 52.

Nor, in ejectment of ward. 2 *Rol.* 744. l. 47.

Nor, in *scire facias* to execute a fine. 2 *Rol.* 745. l. 4.

Nor, in *quod permittat*. 2 *Rol.* 745. l. 15.

Or, writ of intrusion. 2 *Rol.* 745. l. 17.

(A 2.)

(A 2.) How it shall be made.

A tenant may vouch generally without shewing cause. 2 *Inst.* 246.

(A 3.) When Cause shall be shewn.

But he must shew cause for the voucher, when the voucher is out of the common course; as, if a man vouches himself. 2 *Roll.* 753. l. 10.

Or, himself and a stranger; himself and another parcener, &c. 2 *Roll.* 753. l. 15.

(B) Counterplea of Voucher,

(B 1*) By the Common Law.

IF the tenant vouched, the demandant, by the common law, might counterplead; viz. he might by replication shew, that such voucher ought not to be allowed.

As, that the vouchee, or any of his ancestors, had nothing in the tenements. *Jen.* 412.

That there was no such person as the vouchee, 2 *Inst.* 245.

That the vouchee was a villein. 2 *Inst.* 245.

That the vouchee was dead. 2 *Inst.* 246.

If issue be upon the counterplea, and at *nisi prius* the vouchee makes default, after a *petit cape* returned and no appearance, the demandant shall have judgment. *R. Jen.* 412, 13.

(B 2.) By Statute.

But now by the *stat. W. 1. 3 Ed. 1. 40.* in writs of possession; as, *mortd'ancestor, ayel, cosnage, nuper obiit*, intrusion, and the like, if the tenant vouches, there shall be a counterplea, that the tenant, or his ancestors, first entred after the death of him of whose seisin the demandant claims.

So, in *besaile*, and other actions *ancestral* possessory. 2 *Inst.* 241.

So, in dower against a stranger, right of ward, &c.; for it is possessory in its nature. 2 *Inst.* 241.

And it will be a good counterplea if the tenant, who vouches, is tenant by reſceit, by voucher, &c. 2 *Inst.* 242.

If his ancestor, who abated, leased for life, and granted the reversion to A. who granted to the tenant. 2 *Inst.* 242.

If A. and B. abated to the use of B. who afterwards granted to A., he being a coadjutor to the abatement, will be within the statute. 2 *Inst.* 242.

But there is no counterplea in a *formedon*, or other writ of right in its nature. 2 *Inst.* 241.

Nor, if the ancestor who abated is evicted by A. who enfeoffed the tenant. 2 *Inst.* 242.

If the abator enfeoffs A., and takes back the estate to him and B., and then both vouch. 2 *Inst.* 242.

So, by the *stat. W. 1. 40.* in writs of right, and also in possessory writs, there shall be a counterplea, that the vouchee or his ancestors never had seisin of the lands in demand, or the services of them,

since the feisin of him by whom the demandant claims, and before the writ purchased, whereof he might enfeof the tenant or his ancestors.

So, if a body politic be vouched, *that the body, or their predecessors, never had feisin*, &c. 2 *Inst.* 244.

If husband and wife are vouched, *that the wife, or her ancestors, never had*, &c. 2 *Inst.* 244.

If two are vouched, *that one of them, &c. had not*, &c. 2 *Inst.* 244.

But there is no counterplea within this statute, if the vouchee had for life or for years, jointly with another, &c.; for it may be by feoffment *de facto*, or other conveyance. 2 *Inst.* 244.

If he ever had feisin, tho' it is avoided or determined. 2 *Inst.* 244.

If the vouchee is present in court, and enters immediately into warranty, the demandant cannot counterplead. 2 *Inst.* 243.

If the demandant counterpleads, and the tenant waives his voucher, he may afterwards plead in abatement or bar. 2 *Inst.* 242.

So, if he demurs to the counterplea, and it is adjudged against him the same term. 2 *Inst.* 243.

But if the demurrer is adjourned to another term, it is peremptory, and there shall be judgment against the tenant. 2 *Inst.* 243.

(C) Revoucher.

IF the sheriff, upon the summons, returns the vouchee to be dead, the voucher afterwards may vouch another of the blood of the first vouchee.

So, if it is returned upon the *capias ad valentiam* against the vouchee, or upon the *petit cape* upon his default.

So, if the cause of voucher be traversed, where the cause ought to be shewn, the tenant may waive and vouch another immediately.

(D) What Process shall be against a Vouchee.

THE vouchee may appear *gratis*, and enter immediately into warranty.

If he does not appear, a summons *ad warrantizandum* goes against him. *Co. L.* 101. b.

If, upon the summons, the sheriff returns *nihil*, an *alias* and *pluries* go. *Co. L.* 101. b.

If he does not appear upon the *pluries*, a *sequatur sub suo periculo*. *Co. L.* 102. a.

And the tenant must procure the vouchee to appear, otherwise there shall be judgment for the demandant against the tenant for failure of his voucher. *Co. L.* 102. a.

If, upon summons, &c. the sheriff returns, *that he has summoned*, and the vouchee does not appear, a *grand cape ad valentiam* goes against him. *Co. L.* 101. b.

If *nihil* be returned, and still he does not appear, an *alias grand cape*, *pluries*, and *sequatur sub suo periculo*. *Co. L.* 101. b.

If the tenant does not yet appear, there shall be judgment against the tenant for the demandant, and also for the tenant to recover in value against the vouchee. *Co. L.* 101. b.

So, if the vouchee appears, and afterwards makes default, a *petit cape*.

cape ad valentiam goes against him; and upon his second default, judgment against the tenant, and for the tenant against the vouchee, Co. L. 101. b.

There ought to be nine returns between the *teste* and return of the summons *ad warrantizandum*. 2 Inst. 240.

(D 2.) If he be an Infant.

If the vouchee be an infant, the *parel* shall demur till his full age, 2 Inst. 245.

If the tenant alleges him to be an infant, and the demandant says otherwise, a summons *ad visum* goes.

And, if *nihil* is returned, and he does not appear, an *alias*, *pluries*, and *sequatur sub suo periculo*, and if the vouchee does not yet appear, there shall be judgment for the demandant.

If the vouchee appears, and is adjudged upon the view to be of full age, a summons *ad warrantizandum* goes against him, and upon *nihil*, an *alias*, *pluries*, & *sequat.*, &c. *ut supra*.

(D 3.) If he be a Foreigner.

How it shall be, if the vouchee lives out of the jurisdiction of the court where the plea is depending; as, if it is in *London*, a county *palatine*, &c. *vide post*. (H).

(E) Count against a Vouchee.

WHEN the vouchee enters into warranty, he stands in the place of the tenant, and the demandant counts against him as against the tenant. 2 Inst. 241.

(F) Pleas by him.

(F 1.) In Abatement.

SO, the vouchee may plead, as the tenant may.

As, he may plead in abatement, that the demandant took husband after the last continuance, or is outlawed, excommunicated, &c.

(F 2.) *In bar.*] So, the vouchee may plead in bar, all pleas *in esse*, at the time of the voucher.

(G) Judgment.

IF the vouchee, after plea of nothing by descent, and issue thereupon, makes default at *nisi prius*, judgment may be against the tenant, or conditional against the vouchee, if he has an estate in the said county; and if not, against the tenant. R. 2 Cro. 618. Dub. how it shall be. Cro. El. 46.

(H) Foreign Voucher.

IF the plea be in *London*, where the tenant vouches to warranty one in a foreign county, by the *st. Glo.* 12. and 9 *Ed.* 2. the demandant shall have a summons *ad warrantizandum* against the vouchee, returnable

returnable in *C. B.*, and the record shall be removed thither by *recordare*, and the mayor and bailiffs, being required by the same writ, shall give day to the parties to appear there at the return of the writ, and, after the warranty determined, the *C. B.* remands the record, and the vouchee shall be commanded to answer there the plea in chief. 2 *Inst.* 324.

And, if the demandant recovers, the tenant shall have a writ in *B.* to the mayor and bailiffs to extend his land, and return the extent to *B.*, and then he shall have a writ to the sheriff of the county where the vouchee was summoned, that he cause him to have of the land of the warrantor *ad valentiam*. 2 *Inst.* 324.

And there shall be the same remedy, where a foreigner is vouched, in *Chester, Durham*, courts of *Antient Demefne*, &c. 2 *Inst.* 325.

And, where any foreign plea is pleaded, upon which the court cannot proceed. 2 *Inst.* 325.

By the *st.* 9 *Ed.* 2. the statute of *Glo.* 12. is altered, so that the record shall be removed from *London* to *C. B.*, and the justices there summon the vouchee before them, and the pleading shall be there; and if the tenant does not appear, there shall be a *petit cape* to the mayor, to give judgment against him, if he cannot save his default. 2 *Inst.* 325.

If the tenant vouches *A.* in *London*, and *B.* in a foreign county, the record shall be removed *in toto*; for process must be against all the vouchees at the same time; and when the warranty is determined, it shall be remanded *pro toto*. 2 *Inst.* 326.

In *C. B.* the justices may proceed to determine the warranty. 2 *Inst.* 326.

And, if the vouchee vouches over, award process against the vouchees *toties quoties*. 2 *Inst.* 326.

So, the tenant may be *essoined* in *B.*, and the demandant, if he makes default, nonsuited. 2 *Inst.* 326.

If husband and wife vouch, and the husband makes default, the wife may be received in *C. B.* *Semb.* 2 *Inst.* 326.

But none shall plead in chief, except in the inferior court. 2 *Inst.* 326.

And after warranty determined, there shall be a *procedendo*. 2 *Inst.* 326.

After the plea determined against the tenant in the inferior court, the tenant may surmise, that execution is sued against him, and pray a *venire facias recordum*. 2 *Inst.* 326.

And thereupon the justices of *C. B.* award an *extendi et appreciari facias* against him to the mayor, &c. 2 *Inst.* 326, 7.

Vide more concerning *Voucher*, in *Abatement*, (I 28.)—*Courts*, (O 2.)—*Estates*, (B 28.)—*Garranty*, (K 2.)—*Pleader*, (2 Y 18.—3 A 6.—3 E 5.)

U S A G E.

Vide Admiralty, (E 13.)—*Copyhold*, (S 1, &c.)—*Ireland* (F).—*Prescription*, (E 2.)

Usage of Parliament.

Vide Parliament, (G 1, &c.)

U S E S.

(A) Uses ; by the Common Law.

AN use by the common law was a trust reposed in him who had the estate of the land, that *cestui que use* might take the profits. *Co. L. 272. b. 2 Leo. 15. 1 And. 318.*

And was not issuing out of the land, but collateral to it, and annexed in privity to the estate of the land, and the person of him who had the estate *Co. L. 272. b. 1 Co. 121. b.*

And therefore, no remedy by action, or otherwise, was given for it by the common law. *1 And. 318.*

All uses were *in esse*, in possession, reversion, or remainder, or in contingency, which by possibility might come *in esse* upon a contingency. *1 Co. 121. b. Vide post. (K 5, 6.)*

And to every use there were two incidents inseparable; viz. 1. Confidence in the person, express or implied; 2. Privity in estate, express or implied. *1 Co. 121. b.*

So, all inheritances local, as lands, rents *in esse*, liberties, and franchises visible and local, may be conveyed to an use. *Jon. 127.*

Liberty of *retorna brevium*. *Jon. 118.*

So, an advowson in gross, common for so many cattle. *Jon. 118.*

But personal inheritances, which have no relation to lands or hereditaments local, cannot be conveyed to an use. *Jon. 127.*

As, an annuity, office of trust which requires personal service, a way, authority, &c. *Jon. 127.*

Uses at the common law were, in some respects, as chattels; for they passed by devise. *1 Co. 121. Vide Devise (A).*

So, they passed by a grant of all hereditaments; for it was a descendible inheritance. *Al. 14, 15.*

A feoffment by tenant in tail, of an use, gave an estate only for his own life. *Mo. 39.*

So, by the common law an use, tho' suspended, might be devised; as, if *A.* and three others were seised to the use of *A.*, tho', as to a 4th part, the use was suspended, yet *A.* might devise the whole; for when he dies, his part, as to the possession, goes to the survivors. *1 Leo. 257. Vide Devise (A).*

So, if feoffees to an use were disseised, *cestui que use* might devise, that the feoffees enter and convey to *B.* *1 Leo. 257.*

And to avoid mischiefs by secret conveyances to an use, by the *st. 1 R. 2. 9.* enlarged by the *st. 4 H. 4. 7.* and explained by the *st. 11 H. 6. 3.* an action was given to the disseisee, against the *pernor* of the profits, who was *cestui que use*. *1 Co. 123. a.*

And, tho' by those statutes it was enacted, that the writ against the *pernor* should not abate for *non-tenure*, by equity it was extended, that it should not abate by plea of joint-tenancy, or disclaimer. *1 Co. 131. a.*

So, by the *st. 1 H. 7. 1.* a formedon was given against the *pernor* of the profits.

And this extends to a *scire facias* to execute an estate-tail in remainder. *1 Co. 131. b.*

By the *st. 4 H. 7. 17.* and *19 H. 7. 15.* feoffments to uses are made void, which defraud the lords of wards, reliefs, heriots, purchases made by their villeins, &c. or others, of their executions. And

And by the *st.* 1 R. 3. 1. which was more general, all feoffments, grants, &c. by *cestui que use* are confirmed against him and his feoffees. R. 1 And. 29.

So, against a disseisor of his feoffees. 1 Co. 131. b.

So, grants of rent by *cestui que use* are confirmed. 1 Co. 131. b.

Execution by *elegit.* 1 Co. 131. b.

Grants or feoffments by him after a conveyance to him by the disseisor of his feoffees. 1 Co. 131. b.

(B 1.) Since the Statute 27 H. 8. 10.

BUT to avoid mischief by subtle and clandestine uses, the *st.* 27 H. 8. 10. enacts, that where any persons shall be seised of any lands, or other hereditaments, to the use, confidence, or trust of any other, by reason of any bargain, sale, feoffment, fine, recovery, covenant, agreement, will, or otherwise, all such persons who have such use, confidence, or trust in fee, tail, for life, years, or otherwise, or in reverter or remainder, shall be adjudged in lawful seisin and possession of the same lands, &c. in such like estates as they had or shall have in the use, &c.; and the estate, possession, &c. of him seised to the use, shall be adjudged in him that hath the use, after such quality, form, and condition as he had in the use.

And therefore, by this statute, all uses were intended to be extirpated. 1 Co. 125.

And the means, intended for the extirpation of uses, was the execution of the possession to the use.

And therefore, in all conveyances of lands, tenements, or hereditaments to the possession, shall be executed to the use.

And this, where the use is created of a rent since the statute, as well as of a rent *in esse* before. R. Dy. 362. b. Bend. pl. 299. 1 And. 51, 52.

(B 2.) What Uses are executed by the Statute.

But to every use executed within this statute four things must concur; viz. 1. A person seised to the use; 2. *Cestui que use in esse.* 3. An use *in esse*; 4. Transferring of the estate out of which the uses arise to the *cestui que use.* 1 Co. 126. a. 136. a.

And therefore, if the estate of the feoffees was divested by disseisin, or alienation, to such as could not be seised to the first uses, those uses cannot be executed till re-entry of the feoffees, or recovery by them. 1 Co. 126.

And if their entry or action was barred, they can never be executed. 1 Co. 126. b.

So, if *cestui que use* had made a feoffment, the right to the use cannot be executed till re-entry by the feoffees. 1 Co. 126. a.

So, a future or contingent use cannot be executed till it comes *in esse.* 1 Co. 126. a. 136. a.

For all uses *in esse* are executed immediately, and when the contingency happens, a possibility of entry, or *quasi sciintilla juris* remains in the feoffees, which will serve for such future use. 1 Co. 129. b. 130. b. Dy. 340. b.

So, no use shall be executed, which is limited contrary to the rule of the common law; as, if it is limited to A. for years, remainder to
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the right heirs of *B.*; for a freehold cannot be in *abeyance*. *R. 1 Co. 130.*

Or, if an use in remainder is contingent, and the particular estate fails before the contingency happens. *1 Co. 130. Vide Estates; (B 13, &c.)*

Or, if an use is limited in tail, with a proviso that he should not suffer a recovery, &c. which is repugnant. *1 Co. 130. a. 138. a. Vide Condition, (D 5.)*

If an use is limited to the heirs of *B.*, and no particular estate to support it in the mean time. *R. 4 Mod. 154. Ca. Parl. 104. Vide Estates, (B 13, &c.)*

So, where a term for years is granted to the use of another, the use cannot be executed by the statute; for the grantee is not seised. *Dy. 369. a. 1 And. 294.*

So, if a termor makes a lease for a less number of years, and afterwards grants the reversion of the term, nothing passes without attornment; for the use cannot be executed by the statute, tho' it was upon a valuable consideration. *R. 2 Jon. 217. 232.*

[Under a devise of lands to trustees in fee in trust for *A.* (an infant) for 99 years if he should so long live, and after that term to his first, second, third, and fourth sons, and the issue male of their bodies for the like term of 99 years, as they shall be in seniority of birth; and in default of such issue male in him or them, then to *B.* and the issue male of his body, for the like term of 99 years; and in default of such issue male, then to the right heirs of the devisor: *A.* takes an estate for 99 years determinable with his life, and upon his death, his first son takes a like estate; but the subsequent limitations to his other sons and to *B.* are void, not being limitations of uses executed by the statute. *Somerville v. Lethbridge, B. R. H. 35 Geo. 3. 6 T. R. 213.*]

[A devise of lands to trustees and their heirs upon trust to permit a *feme-covert* to receive and take the rents and profits during her life for her sole and separate use, and after her decease to the use of the first and other sons of her body, then to the daughters as tenants in common, with other like limitations to other *femes-coverts*, vests the legal estate by way of use executed in fee-simple in the trustees. *Harton v. Harton, B. R. E. 38 Geo. 3. 7 T. R. 652.*]

(C) How raised.

USES are raised by transmutation of the possession; as, upon a fine, feoffment, common recovery, &c. *Co. L. 271. b.*

Or, out of the estate of the owner of the land; as, by bargain and sale. *Co. L. 271. b. Vide Bargain and Sale, (B 1, &c.)*

By covenant, upon good consideration, to stand seised, &c. *Co. L. 271. b. Vide Covenant, (G 1, &c.)*

[*G. S.* being seised in fee of lands, in consideration of a marriage to be had between him and *A. S.* by indenture, between himself on the one part, and the said *A. S.* and *W. S.* on the other, gives, grants, enfeoffs, aliens, and confirms to *A. S.* and *W. S.* and their assigns, lands then in his own possession, *habendum* to the use of the said *A. S.* for life, remainder to the heirs of her body begotten by the said *G. S.*, who covenants that the lands shall remain to the said uses; this is a covenant to stand seised to uses. *2 Wilf. 22.*]

[So,

[So, where *T. K.*, being seised in fee of lands by lease made between him and *C. K.*, bargained and sold the said lands to *C. K.* for a year, and by release dated the next day, made between the said parties, granted, released, and confirmed to the said *C. K.*, *after the death of him the said T. K.*, all that, &c. with several limitations over; this was held to operate as a covenant to stand seised to uses. *2 Wilf. 75.*]

So, by will; for a man may devise lands to the use of another. *R. 1 Leo. 253, 4. Vide Devise (I).*

But an use cannot be raised upon an use. *1 Leo. 6. 148. Vide Bargain and Sale, (B 3.)*

(D) How declared.

(D 1.) What shall be a sufficient Deed for it.

AN use cannot be declared by *parol* without deed or other writing; and therefore a bargain and sale, or covenant to stand seised, &c. is not good without deed. *Vide Bargain and Sale, (B 4.)—Covenant, (G 1.)*

So, the use of a fine, recovery, or feoffment, cannot arise to a stranger by *parol*, except in special cases.

So, a fine upon *grant and render* cannot be averred to be to another use than it imports, without writing. *2 Co. 75, 76. a.*

So, a fine of a rent cannot be declared to the use of a stranger without a deed. *R. 2 Rol. 788. l. 27.*

And now, by the *st. 29 Car. 2.* all declarations of trust of any lands shall be manifested and proved by writing, signed by the party having power to declare such trust.

And therefore, an absolute devise to *A.* shall not be averred to be made upon trust for a superstitious use. *R. 1 Sal. 162. Vide post. (D 2.)*

But a deed indented, or poll, precedent to the fine, recovery, &c. is sufficient to declare the uses thereof.

So, if a man makes a feoffment to the use of such person, and for such estate, as he shall declare by his will, his will is sufficient to declare the uses. *Co. L. 111, 112. R. 1 Vent. 194.*

So, if a devise be to *B.* to the use of *D.*, the will is sufficient to guide the use. *Mo. 107. Poph. 4. 2 Vent. 312. Vide post. (D 2.)*

If the devise is to *A.* and *B.* and their heirs, to the use and intent that they permit *G.* to take the profits for his life, and, after his death, that they stand seised to the use of the heirs of the body of *G.*; it will be a use executed in *G.* in tail. *R. Lut. 824. Sal. 679.*

So, if a man devises land by his will, and afterwards makes a feoffment to the use of such persons, and for such estates, as he has declared by his will; tho' the feoffment is a countermand of the will, yet it is sufficient to declare the uses of the feoffment. *R. Mo. 786. 3 Ca. Ch. 100.*

So, if a lord of a manor releases to his copyholder and his heirs, to the use of *B.*, this release is sufficient to declare the use; for a rent might be reserved upon it. *R. 2 Rol. 788. l. 35.*

So, if a man covenants to make an assurance by fine, feoffment, &c. which shall be to the same uses, a fine, &c. afterwards, without a new agreement, shall be to the uses of the covenant; tho' by the deed

deed in which the covenant is, it was to *B.* and his heirs upon condition, and the feoffment or fine is to him and his heirs, generally, which imports an absolute estate. *R. Cro. El. 300.*

So, if there be a deed between an husband of the one part, and his wife of the other part, agreeing that a fine shall be levied to such uses, it is sufficient to declare the uses; for it is a deed-poll. *R. 4 Mod. 264. 267.*

So, every writing which shews the agreement and intent of the parties. *4 Mod. 264. Ca. Parl. 145.*

As, a covenant to levy a fine of all his land, which for 24 acres shall be to the use of *B.*, and he afterwards levies a fine of 24 acres of land only. *Dub. 2 Rol. 791. l. 25.*

A deed, tho' it be afterwards erased, and the seals torn off, by accident. *Lut. 226.*

A deed of bargain and sale, or feoffment, tho' no enrolment or livery ensues. *4 Mod. 264.*

So, the uses of a fine, &c. may be declared by a deed subsequent to the fine. *Dy. 136. a. Cont. Cro. El. 218. R. acc. 9 Co. 10. 15. d. Mo. 192. R. 2 Rol. 782. G. 1 And. 125.*

And tho' a subsequent deed declares the intent of the parties to be, that a fine shall be levied to such uses, it is sufficient, tho' it does not expressly say, that it was the intent at the time of the fine, &c. *Semb. cont. Mod. 192.*

And tho' by the *st. 29 Car. 2. 3.* it is enacted, that all declarations of trust, &c. shall be manifested in writing, yet uses and trusts may be declared by a subsequent deed by the *st. 4 & 5 Ann. 16.*

So, there may be an information for the discovery of a trust by *parol* to superstitious uses; for the *st. 29 Car. 2.* does not bind the king. *R. 1 Sal. 162.*

So, if a deed be to declare the use of a fine, which varies in some circumstances, yet it shall be to the same uses by construction of law, if nothing appears that it was to another intent. *Ca. Parl. 144. R. 5 Co. 26. b.*

So, if the use of a fine be declared by a deed precedent, which agrees in time, parties, quantities, and other circumstances, no averment shall be admitted that it was to other uses. *Ca. Parl. 144. R. 5 Co. 26. b.*

But if the feoffor, conusor, &c. after the fine, &c. and before a subsequent deed to declare the uses, makes any mean estate or incumbrance, it shall not be avoided by such subsequent declaration, without proof that the fine was intended to the same uses. *R. 9 Co. 11. a.*

So, if the declaration of uses be by deed subsequent, the fine may be averred to be to other uses. *R. 9 Co. 11. a. Ca. Parl. 144.*

So, if it be by deed precedent, where the fine varies, in time, number of acres, or other circumstances, from the deed. *R. 2 Cro. 29. 5 Co. 26. b. Mo. 723.*

So, if there be a precedent deed to declare the uses of a fine, &c. and it varies in quantity of acres, any of the parties, time of levying, or like circumstances, it may be averred by *parol* to be to the same uses. *R. 2 Cro. 76. a.*

If the deed be, that a fine shall be levied to four persons, and two die, and it is levied to the survivors, it shall be to the same uses. *R. 2 Rol. 799. l. 25.*

So,

So, if a common recovery be suffered *œt. Mich.*, and by indenture 14 Nov. it is declared, that all recoveries hereafter to be suffered shall be to such uses; this is not sufficient to lead the uses of a recovery before, in the same term, (tho' all the term in law is but one day,) without an averment that such was the intent. *R. 2 Rol. 799. l. 10.*

The declaration of a use is but the direction of a trust. *Mo. 610.*

And such writing, words, or circumstances, as manifest the intent and mind of the feoffor, are a sufficient declaration of a use. *Mo. 610. Vide post. (L 3.)*

As, if upon a feoffment to *A.* and *B.* they by another deed agree, that after 100 years the feoffor and his heirs shall have it again; this is sufficient to declare the use to the feoffor after 100 years. *R. Mo. 723.*

[If a father, tenant for life, and son in tail, with remainders over, on an advantageous marriage for his son an infant, join in executing articles, whereby the father covenants that, after the son's coming of age, they will join in fine and recovery of the estate to divers uses, and they accordingly join in such fine and recovery; the son's executing these articles is not sufficient to declare the uses of fine and recovery. *Nightingale v. Earl Ferrers, M. 1733; 3 P.W. 206.*]

(D 2.) To what Use it shall be, when there is no Declaration:

If a fine is levied, and no use declared nor consideration paid, it shall be to the use of the conusor. *2 Rol. 781. l. 42.*

So, if a common recovery is suffered, it shall be to the use of him who suffers the recovery. *Dy. 146. b. 2 Rol. 781. l. 40. 789. l. 47. D. 9 Co. 8. b.*

So, since the *st. quia emptores terrarum*, a feoffment, without a use declared or consideration paid, shall be to the use of the feoffor. *2 Rol. 781. l. 35. R. Dy. 146. b. Acc. 2 Lev. 77.*

Tho' tenant for life, and he in remainder in tail, join in a feoffment to *A.* and his heirs, to make him a tenant to the *præcipe*. *R. Pal. 359.*

Or, if tenant for life surrenders to him in remainder in tail, to make him tenant to the *præcipe*. *R. Pal. 359.*

Or, tenant in tail levies a fine to *A.* and his heirs for such an intent, and seven years after suffers a recovery without declaring the use. *R. Eq. R. 16.*

And it shall be to *A.* and his heirs till the recovery, without any use declared by the *st. 29 Car. 2. 3.* for the intent appears by the voucher. *R. Eq. R. 17.*

And a fine, recovery, or feoffment, shall be to the use of the feoffor, &c. in the same plight, and for the same estate, as he had before; as, if two joint-tenants levy a fine, &c. it shall be to their use jointly. *2 Co. 58. a.*

If tenant for life and he in reversion levy a fine, it shall be to the one life, to the other in fee. *2 Co. 58. a.*

So, if he suffers a recovery. *R. Pal. 405. Latch, 82. Noy, 77.*

So, if the owner of the land and a stranger join in a fine, the use arises wholly to the owner, and nothing to the stranger. *2 Co. 58. b. R. 2 Rol. 789. l. 50.*

So, if husband and wife, of the wife's land, it arises wholly to the wife. *R. 2 Co. 58. b. Vide Baron and Feme, (G 1.)*

So,

So, if the use declared is void or impossible, it shall be to the use of the feoffor; as, a feoffment to the use of *A.*, and there is no such person *in rerum natura*. *Dal.* 112.

So, a fine *sur grant et render*, if the uses upon the *render* are void *in toto*, shall be to the uses to which the *render* is intended. *Mo.* 488.

A feoffment to the uses mentioned in such an indenture, and there is no such indenture, shall be to the use of the feoffor. *Dal.* 112.

But if tenant in tail, remainder to himself in fee, levies a fine, without declaring the use, it shall be to himself in fee.

So, if tenant in tail, remainder to *B.* in fee, suffers a recovery, without declaring the use, it shall be to him in fee; for he had a power to do it, and it shall be intended to that intent. *Pol.* 526. *R.* P. 8 *Ann. Ld. Altham and Anglesey. Eq. R.* 16.

And the use follows the nature of the land, since the *st.* 27 *H.* 8. 10. as well as before. *R.* 1 *Co.* 127. 2 *Co.* 58. 2 *Rol.* 780. l. 26.

And therefore the use of land of the nature of *borough-english* shall descend to the youngest son. 2 *Rol.* 780. l. 28.

So, if the land was of the nature of *gavelkind*, he shall be afterwards seised in the same manner; for the use follows the nature of the land. 2 *Rol.* 780. l. 30.

If the feoffor was seised of the land, as heir of the part of his mother. *Co. L.* 13. a. *Vide Discent*, (C 6.)

So, if an use be declared upon a contingency, the use in the mean time shall be to the feoffor, &c.; as, if a man makes a feoffment, and declares that after a marriage between him and *A.* it shall be to the use of him and his wife and to his heirs, the use is to him and his heirs, as before, till the marriage. *R.* 2 *Rol.* 791. l. 35. *Pol.* 58.

So, if the feoffment be to the use of his will, or to the use of such a person as he shall appoint by his will, the feoffees are seised to the use of the feoffor and his heirs in the mean time. *Co. L.* 271. b. *Pol.* 58.

So, if the feoffment be to the use of such a one for life, or for years, &c. the use of the inheritance shall be to the feoffor. *Co. L.* 271. b.

Or, to the use of *A.* for life, remainder to *B.* in tail, the use of the fee shall be to the feoffor. *Pol.* 58.

But if feoffees were seised to uses, and before the *st.* 27 *H.* 8. 10. had levied a fine or made a feoffment, &c. the second feoffees, having notice, shall be seised to the first uses. *Pl. Com.* 351. a. 1 *Co.* 122. b.

Tho' the feoffment, &c. was made to them upon a valuable consideration. *Pl. Com.* 351. a. 3 *Co.* 81.

So, if they had not notice, where the feoffment was without consideration. 3 *Co.* 81. b. *Pl. Com.* 351.

Or, upon consideration of blood, &c. and not for money. 3 *Co.* 81. b. 2 *Rol.* 779. l. 17.

Tho' the feoffment was to *cestui que use* himself; as, if the feoffment was to *A.* and his heirs male of his body, remainder to *B.* in fee, and the feoffees enfeoff *A.* (being conusant of the uses) to the use of himself and the heirs of his body, and *A.* dies without heir male, his heir general shall be seised to the use of *B.* in fee. *R.* per all *J. Kel.* 93. a. 2 *Rol.* 781. l. 25.

So, if *A.* covenants to stand seised to the use of himself for life, remainder to his son for life, with several remainders in tail, remainder to his right heirs, and after reciting the uses, without consideration grants his reversion in fee to *B.* to the use of *B.* and his heirs, *B.* shall be seised to the first uses, since the *st.* 27 *H.* 8. 10. as before, having notice, &c. *R.* 2 *Rol.* 796. *l.* 5.

Yet where feoffees to an use make a feoffment to others, not having notice, upon a valuable consideration, the second feoffees are not seised to the first uses. 1 *Co.* 122. *b.*

So, if the feoffment was to three, of whom two were consuant of the first uses; but the third was not. *Per two J. Hob.* 350. but the two consuant shall answer in equity: *Hob.* 350.

So, if the feoffment was to others, having notice, they are not seised to the first uses, where the first uses were raised without consideration, or upon consideration of blood only. 3 *Co.* 81. *b.* 2 *Rol.* 779. *l.* 22.

So, if the feoffment was to others, having notice, and expressly limited to their use, they are not seised to the first use.

So, a gift in tail shall be to the use of the donee, tho' no use or consideration be expressed. *Dy.* 146. 2 *Rol.* 781. *l.* 47.

So, a lease for life, or years, shall be to the use of the lessee. 2 *Rol.* 781. *l.* 50.

So, an assignment of a lease shall be to the use of the assignee; for a consideration is implied; as, payment of rent to him in reversion, &c. *R.* 2 *Rol.* 781. *l.* 55.

So, if part was expressed to be to the use of the grantee, and nothing said as to the other part, the whole shall be to the use of the grantee. *R.* 2 *Rol.* 782. *l.* 5.

So, if a fine *sur grant et render* was to *B.* with a *render* to *A.* in tail, and nothing said of the fee, it was to the use of the conusee. *R.* *Mo.* 46. 488.

So, if a recovery was to the intent they should convey, it should be to the use of the recoverors in the mean time. *R.* *Mo.* 103.

So, before the *st.* *quia emptores terrarum*, a feoffment, without use or consideration, was to the use of the feoffee in respect of his tenure of the feoffor. *Dy.* 146.

So, a fine *sur grant et render*, upon the acknowledgment, shall be to the use of the conusee, otherwise there can be no *render*. *R.* *Mo.* 488.

If the *render* be to *A.* for years and then to the first, second, &c. sons in tail, which remainders are void for want of a freehold, the uses after the term to *A.* shall be to the conusee. *R.* *Mo.* 488.

So, a devise to *A.* and his heirs generally shall be to the use of the devisee, and cannot be averred to be to another use. *Semb.* 1 *Sal.* 162. *Vide ante*, (D 1.)

So, a devise to *A.* and his heirs for the life of *B.*, upon trust to permit *B.* to take the profits for life, shall be a trust, not an use executed in *B.* *R.* 2 *Vent.* 312.

(D 3.) To what, when different Declarations.

If there be an indenture to declare the uses of a fine, to be levied, and afterwards another agreement is made for the uses of the same fine,

fine, by writing, as high or higher, the last agreement shall stand. 5 Co. 26. a.

As, if there be an indenture to declare the uses of a fine, and afterwards another indenture for the same purpose, the last indenture shall direct the use. *Mo. 107. R.* that it may be averred to be to the use of the one indenture, or the other. 2 *And. 46.*

If there be an indenture 29th *January* to declare the use of a fine, and there be a deed 31st *January* between husband and wife, which declares other uses, the fine shall be to the use of the last deed, where there was a variance between the fine and indenture 29th *January. R. 4 Mod. 261. Ca. Parl. 145.*

Tho' the variance be, that it was levied before, as well as where it is after, the time directed by the deed. *R. 4 Mod. 261. Ca. Parl. 145.*

But if a man by indenture covenants to make a mortgage, and to levy a fine to the use of the mortgagee, and before the fine ingrossed, by another indenture agrees the fine shall be to the same use, with an addition, that the mortgagor shall take the profits in the mean time; this last indenture does not revoke the first, tho' it neither recites nor mentions it, for both shall be taken as one conveyance. *R. 2 Rol. 793. l. 10.*

So, if husband and wife, tenants for life, and to the heirs of the husband, make a mortgage with a proviso, that upon payment of 100 pounds they shall re-enter, and that all fines, &c. shall be to the mortgagee till payment, then to the husband and his heirs, and a fine was levied, then the wife survived and paid; the fine shall be construed to be to her use, not to the use of the heir of the husband. *R. Cro. El. 744.*

So, if a husband and his wife, who has a jointure in the land, levy a fine in order to make a building lease, and that the wife shall have the reserved rent for her jointure; this, being for a special purpose, does not extinguish her jointure, nor subject it to a *mesne* charge made by the husband between the jointure and lease. *R. Skin. 238.*

[So, if a man seised to him, and the heirs of his body, remainder to his right heirs, by lease and release conveys to trustees to the use of himself for life, remainder to trustees to preserve, &c. to his intended wife for life, to his first and other sons by her; then marries, has issue, suffers a recovery, and by deed declares the uses to be to A. &c. to sell, and out of the money to pay debts, and to pay the residue, or re-convey lands unfold to himself and heirs, and A. conveys to B.; B. has no title, for the recovery inures to the use of the settlement, and tenant in tail can convey a base fee, not void, but voidable by the issue in tail. *Goodright v. Mead, T. 5 G. 3. 3 B. M. 1703.*]

(D 4.) To what, when the Declaration is not by all Parties.

If two joint-tenants levy a fine, and only one declares the uses, it will be good for a moiety only, except where the other's consent to such declaration is proved. *Latch, 82. Pal. 405. Noy, 77.*

So, if tenant for life, remainder in tail, suffers a recovery, in which the remainder-man is vouched; if he does not join in the declaration of the uses, he is not bound. *Latch, 82. Pal. 405. Noy, 77.*

(E) Who may be seised to an Use.

ALL persons capable of taking by feoffment, may be seised to an use.

(F) Who not.

BUT no one can be seised to an use, who cannot execute an estate to the use; and therefore a donee in tail, before or since the *fl.* 27 H. 8. 10. never can be seised to the use of another. *Co. L. 19. b. R. 2 Co. 78. a. R. 2 R. l. 780. l. 10. 15. 2 Cro. 401. 3 Bul. 184.*

And if a gift be to him, *habendum* to him and the heirs of his body, to the use of him and his heirs, the use shall be rejected. *2 Cro. 401.*

Or, it will rather be a limitation at common law, and not by way of use, and the word *use* shall be rejected. *R. Cro. Car. 231. 245.*

So, no one can be seised to an use, against whom an attachment does not lie out of *Chancery* to compel the execution of the use; and therefore a corporation cannot be seised to an use. *1 Co. 122. D. M. 9 W. 3. Inter Jones and Moseley. (Com. 29.)*

Nor, the king. *Mo. 374.*

And therefore if a lessee in trust for *B.* is attainted of treason, whereby the term is forfeited, the king will not be subject to the trust. *2 Rol. 780. l. 5. Dub. Hard. 469.*

If *A.* to whom a bond, &c. is given in trust for *B.* becomes *felo de se*, the king shall not be trustee. *2. Hard. 176.*

So, no one can be seised to an use who does not come in, in privity of the estate; as, a disseisor, abator, or intruder. *1 Co. 122. a. 139. b.*

Tenant by the curtesy or in dower. *1 Co. 122. a.*

So, if an use be to *A.* for life, remainder to *B.*, and *A.* makes a feoffment to another, who has notice of the uses, the feoffee shall not be seised to the first uses; for he is not in, in privity of the estate of the feoffor; but has another estate. *1 Co. 122. b.*

So, persons who claim *paramount*, &c. cannot be seised to an use; as, a lord by escheat. *1 Co. 122. a. 139. b. All. 14.*

The lord of a *villein*, or who enters for *mortmain*, or recovers in a *cessavit*. *1 Co. 122. a.*

So, an alien cannot be seised to an use. *1 Co. 133. a.*

Nor, a person attainted. *Ibid.*

(G) Who may give or take an Use.

YET a corporation by bargain and sale may sell land; for they may give an use, tho' they shall not be seised to an use. *Vide Bargain and Sale, (B 3.)*

So, a fine to *A.* with a deed, which declares the uses to the king, is sufficient to pass an estate to the king. *1 Leo. 33.*

(H) What Interest the Feoffee to Use has in the Land.

FEoffees to use must be seised of the land, otherwise there can be no execution of their estate, seisin, and possession to *cestui que use*. *Vide ante*, (B 1, 2.)

So, if there be any future or contingent use, a sufficient estate must remain in the feoffees to preserve such future use when it comes *in esse*. 1 Co. 129, 130. 137. a.

And if by disseisin, or otherwise, the particular estate be put to a right, before the contingency happens, and the particular tenant dies before entry, the feoffees after his death may enter and revive the estate. R. 2 Rol. 797. l. 20. 40. *Vide Estates*, (B 13.)

Or, rather all the estate is taken out of the feoffees, to supply the uses vested, or when they come *in esse*. Pol. 385, &c.

But the feoffees are only organs or instruments to complete the conveyance, and their seisin continues only for an instant. Pol. 393.

And therefore the wife of the feoffee, &c. shall not be endowed.

So, if the feoffee be attainted for treason or felony, committed before the feoffment, it shall not be forfeited to the king. *Semib. cont. Mo.* 196.

So, by the *st.* 27 H. 8. 10. all right, interest, &c. of the feoffee himself to the estate is saved.

And therefore, if a lease be to A. and B. in trust for another, and afterwards a feoffment, &c. is made to A. and others of the same land to uses, the lease shall not be merged. R. *Mo.* 196.

If a lessee for years be made tenant of the freehold, and tenant to the *præcipe* for a common recovery to an use, his term shall not be merged. R. 1 Sal. 241. *Acc.* 1 Vent. 195.

If a lease for years be made by fine to the feoffee, by him who has a contingent use in remainder, it will be good; for no use remains in the feoffee; and when the contingency happens, so much of the estate only arises to him, as is sufficient to convey the use to him in remainder, and the lease is not disturbed thereby. R. Pol. 64. 66. 393.

(I) What the *Cestui que Use*.

BY the *st.* 27 H. 8. 10. *cestui que use* is immediately seised and in actual possession. *Cro. El.* 46.

And therefore shall have assise, or trespass against a stranger, before entry. R. *Cro. El.* 46.

(K) Limitation of Uses.

(K) What Consideration will be sufficient.

TO a limitation of uses, upon a bargain and sale, or covenant to stand seised, there must be a sufficient consideration.

What will be sufficient, *vide Bargain and Sale*, (B 11.)

What upon a covenant, *vide in Covenant*, (G 3, &c.)

But in a conveyance which operates by transmutation of the possession, as, a fine, feoffment, &c. the will of the parties is sufficient without other consideration; and therefore, if a man in consideration of blood, &c. levies a fine to the use of B. his bastard, it is suf-

ficient, in a fine, to raise the uses to *B.* tho' he was a bastard. 2 *Rel.* 791. l. 15.

If a man in consideration of marriage levies a fine, or makes a feoffment to the use of *A.* and *B.*, &c. the use will arise, tho' the marriage does not take effect. *R. Mo.* 102. *R.* 2 *Rel.* 792. l. 40. *R.* 1 *Leo.* 138.

If a man in consideration of 100*l.* paid by *B.* makes a feoffment to him, to the use of him and *C.*, it is sufficient to raise a use to *C.*, tho' the whole consideration was given by *B.* 2 *Rel.* 791. l. 20.

If a man upon a feoffment, &c. declares the use to the feoffee, the use shall be to him; tho' no consideration, and the feoffor afterwards occupies for many years. *R.* 1 *And.* 57. *Bend. pl.* 20.

(K 2.) To whom an Use limited shall arise.

If a man covenants with *B.* upon such an act to stand seised to *B.* and his heirs, and *B.* dies before the act performed, the use arises to the heir. *R.* 2 *Rel.* 794. l. 45. *Dub. Mo.* 548.

If the limitation is to *A.* and such wife as he shall take, and he afterwards marries, the use may well arise to such wife. *R. per three J. Dy. cont. Mo.* 96. *D. Mo.* 377.

If a feoffment is declared by another deed to be to the intent that, after feoffee has enjoyed for 100 years, the feoffor and his heirs may enter; this amounts to a declaration of uses to him and his heirs, and after 100 years the heir may enter. *R. Mo.* 722.

If a devise be to *A.* and his heirs upon a contingency, the deviser dies, the contingency happens after the death of *A.*, his heirs shall take. *Jen.* 59.

If a feoffment be to the use of *A.* for life, remainder to *B.* in fee; if *A.* refuses, the use shall be to the remainder-man immediately. *R.* 1 *Co.* 154. *b.*

So, if a man covenants to stand seised to the use of *B.* for 24 years, and after the determination of the term to *A.*, if the term does not arise for want of a good consideration, *A.* shall take immediately. *R.* 1 *Co.* 152. *b.* *Mo.* 195.

But generally where a man raises an use by a covenant to stand seised, if the estate of one is void for want of a good consideration, he in remainder shall not take immediately; for each estate arises upon its own proper consideration; as, if a man covenants to be seised to the use of *B.* for life, and after his death in consideration of 100*l.* to *A.* in fee; if *B.* refuses, or his estate is void, *A.* shall not have it till his death. *R.* 1 *Co.* 154. *b.*

So, if the covenant be to the use of *B.* for 24 years, and after the end of those years to *A.*, if the estate for years is void, *A.* shall not take till the 24 years are expired. *R.* 1 *Co.* 154. *b.* 1 *Leo.* 195.

To the use of *B.* till his age of 21 years, and after such age to *A.*, if *B.* dies, *A.* shall not take till *B.* would have attained his age of 21 years, 1 *Leo.* 195.

(K 3.) When it shall arise by the Feoffment, &c. or by a subsequent Deed.

If a man makes a feoffment to the use of such person as he by his will shall appoint, the use arises by the feoffment, and the will is only declaratory.

declaratory. *Co. L. 271. b. R. 6 Co. 17, 18. Mo. 280. 567. 1 Bul. 200. Vide Devise (O).*

And if he devises the land by his will, it will be a sufficient direction of the uses. *Dub. Mo. 476.*

But if the feoffment be to the use of his will, or to perform his will, the uses are raised by the will and not by the feoffment. *Co L. 271. b. R. Mo. 280. Dub. Mo. 476. R. 6 Co. 18. a.*

So, if the feoffment be to the use of such person, and for such estate, as he shall by his will appoint, and he devises the land by his will without reference to his power, where he has authority to devise, as well as to dispose by declaration of the uses of the feoffment, the estate passes by his will. *R. 6 Co. 18. a. Mo. 280. 567. 1 And. 246.*

(K 4.) When it shall arise upon a Condition, &c. performed.

If *A.* tenant in tail, conveys to *B.* and his heirs, who re-conveys to *A.* and his heirs upon condition of entry, if *A.* does not pay 300*l.* at such a day, which was intended as a security for the said sum and interest, and afterwards *A.* suffers a recovery, and devises to *D.*; the recovery operates upon the estate re-conveyed to *A.* in fee, not upon the estate to *B.* *R. 1 Ch. R. 97.*

But if an use is limited upon an impossibility, it shall never arise; as, if a man covenants to stand seised to the use of *B.* after the end of the term which *A.* has in the same land; if *A.* has not any term, the use shall never arise to *B.* *1 Leo. 195.*

So, if an use be limited upon a contingency, which never happens, it will be void; as, if it is to *A.* if all his brothers and their issues die, and one brother leaves issue. *R. 2 Leo. 157.*

So, if an use be limited to *A.* and such wife as he shall afterwards marry, for their lives, the wife, he shall afterwards marry, shall not take; for she cannot take jointly with her husband, as the words import. *R. 1 And. 42.*

So, an use will not arise by implication. *Semb. Pol. 94.*

As, if an estate be to *A.* for life, and after the death of *A.* and *B.* to *C.*, no use arises to *B.* by implication. *Pol. 94.*

(K 5.) What shall be a settled Use.

All uses are *in esse* in possession, remainder, or reversion, or in contingency. *1 Co. 121. b. Vide Estates, (B 16, 17, 18.)*

If the use is raised by the feoffment, &c. and vests in a certain person, this will be a settled use.

Tho' the consideration of the feoffment was fortuitous; as, if a man covenants in consideration of a marriage with *B.* to make an assurance to the use of himself and *B.*, &c. and afterward makes a feoffment and levies a fine to the same uses, *B.* takes an estate, tho' the marriage does not take effect. *R. 2 Rol. 792. l. 40. Vide ante, (K 1.)*

(K 6.) What a contingent Use. -

But if a man levies a fine of the manors of *A.* and *B.*, viz. of *A.* to the purchaser and his heirs, of *B.* as a collateral security for the purchase, viz. to himself and his heirs, till the manor of *A.* be evicted,

and, after eviction, to the purchaser and his heirs, the use to the purchaser is contingent, and does not vest till eviction. *R. 2 Rol. 792. l. 30.*

If grantor of a rent of 20*l.* for security of payment levies a fine to the use, that, if the rent be in arrear, the grantee may enter, if 10*l.* payable at *Michaelmas* is in arrear, he may enter; for the whole is in arrear, when any part is not paid at the day. *R. 2 Rol. 799. l. 35.*

But if the fine is to the use, that, if the rent be in arrear, and the distress for it replevied, the grantee may enter; and for rent in arrear before the fine there is a distress after the fine, and it is replevied, the grantee cannot enter. *R. 2 Rol. 800. l. 10.*

So, if a bargainee covenants upon payment of so much money to stand seised, &c. the use does not arise upon tender and refusal, without actual payment. *R. Mo. 35.*

(K 7.) A springing or resulting Use.

If a fine, feoffment, &c. be to another without consideration, or no use is declared, it shall be to the use of the feoffor, &c. *Vide ante, (D 2.) Vide Executory Devise, in Devise, (N 16.)*

[And tho' lands be comprehended in the general sweeping clause of a deed of settlement, (to certain uses,) yet, if no use be declared of them, they descend to the heir. *Cowp. 9.*]

[But a declaration of uses not in writing will *rebut* the resulting use to the *conusor* of a fine, in favour of the *conusee*. *Doug. 26.*]

If it be by one seised to other uses, and without valuable consideration, or upon valuable consideration with notice of the former uses, it shall be to the first uses. *Vide ante, (D 2.)*

If a fine, feoffment, &c. be to another upon valuable consideration, the use results to the feoffee, &c.

So, if a man makes a feoffment, &c. and declares the use to himself and *A.* his wife after their marriage, the use will well arise to *A.* upon such contingency, *viz.* that the marriage shall take effect; for till the marriage the use results to the feoffor and his heirs. *R. 2 Rol. 791. l. 35.*

So, if a man covenants, in consideration of his marriage with *A.* to stand seised to the use of himself and *A.* till marriage, the use does not arise. *R. 2 Rol. 792. l. 50. Vide Covenant, (G 5.)*

If a man covenants to stand seised after his death, the use results to the covenantor for life, and does not arise to the uses limited till his death, *Semb. 1 Co. 154. b. 2 Lev. 77.*

So, if he covenants to stand seised after so many years, or after any other contingency. *2 Leo. 195. Pol. 65.*

So, if a feoffment be to the use of the right heirs of *B.* after his death, the use arises after the death of *B.* to his right heirs, and in the *interim* to the feoffor. *Semb. 1 Sal. 225.*

Or, to the use of *C.* after the deaths of *A.* and *B.* *Pol. 59. 65. 95.*

So, if he covenants to stand seised to the use of his mother in fee, if he himself dies without issue; for the contingency happens upon his death. *Pol. 530.*

If *A.* settles an estate to the use of *B.* after the death of him and his wife without issue, if the wife dies without issue, living *A.*, the use

use to *B.* will be good; for the use results to *B.* during his life.
2 *Ver.* 372.

If *A.* makes a feoffment to the use of himself for life, and then to *B.* his intended wife, till their son attains the age of 21 years, and afterwards to *B.* for so long time as she continues sole; if *A.* dies without issue, *B.* shall have it for her life. *R. Dy.* 300. *b. Mo.* 15.

But an estate does not arise by way of a springing use, after a death without issue. *R. Skin.* 352.

So, if husband and wife, seised in right of the wife, levy a fine to the use of the heirs of the body of the husband upon his wife begotten; the use does not arise to the heirs of the body of the husband, after the death of husband and wife, as a springing use. *R. 4 Mod.* 153. *Ca. Parl.* 105.

So, an use does not arise by implication to the husband for his life; for there can be no use by implication, but to the person who had the use before, and this was the wife only. *R. 4 Mod.* 154. *Ca. Parl.* 105.

So, if there be a present limitation of a use, which the *cestui que use* cannot take *in presenti*, it shall not arise to him, as a springing use *in futuro*; as, if a fine, &c. be to the use of the right heirs of *B.* who is alive, the use shall never arise to his right heirs. 1 *Sal.* 225.

[If baron seised in fee of lands, in *A.*, and feme seised in fee of lands in *C.*, before marriage, settle the whole to the baron for life, remainder to the feme for life, remainder to the children of the marriage for such estates, &c. as the feme shall appoint; and for want of such appointment, to the children equally, and their heirs, as tenants in common; and for want of such issue, to such persons and uses as the feme shall appoint; and for want of such appointment, as to the lands in *C.*, to the heirs of the feme, and as to the lands in *A.* to the heirs of the baron; if the baron die, leaving one son only, and the feme appoint the whole to him by her will; but if he die without issue, and under 21, the whole to strangers; then if the son die under age and without issue, this is either a good appointment, or, if it be not, it is a good executory devise of the feme's resulting use in the lands in *C.*; but if the appointment be bad, the heir, on the part of the baron, has title. 1 *Wilf.* 270.]

[*A.* by will devised to trustees to the use of *B.* for life, remainder to trustees, &c. remainder to the first and other sons of *B.*, remainder to the daughters of *B.*, remainder to the use of such person as he should appoint by deed; and afterwards by a deed (in which he recited the will) he appointed the same premises "after the death of *B.* and failure of her issue to the use of the first and other sons of *C.*," &c. *B.* afterwards died without issue; holden, that the limitations created by the will and the deed could not be united, and that the limitation in the latter, to the first and other sons of *C.*, &c. was too remote to take effect, being after a general failure of issue of *B.* *Habergham v. Vincent, B. R. M.* 33 *Geo.* 3. 5 *T. R.* 92.]

[By deed and fine an estate was limited to the use of the husband for life, remainder to trustees and their heirs during his life to preserve contingent remainders, remainder to the wife for life, remainder to the trustees and their heirs (not saying "during her life") in trust to support the contingent uses and estates thereafter limited, remainder to the first and other sons in tail, remainder to the wife in tail,

tail, remainder in default of issue to such persons and for such estates as she should appoint, &c. It was holden, that the trustees took a legal estate in fee after the determination of the wife's life-estate, and that all the subsequent limitations were trust-estates. It was holden also, that an appointment by the wife to the use of the right heirs of the husband could not unite with the antecedent life-estate of the husband, but could give only an equitable estate to the person who at his death should answer the description of his right heir. *Venables v. Morris*, B. R. T. 37 G. 3. 7 T. R. 342. M. 38 G. 3. *Ibid.* 438.]

[Where after a devise to one for life the deviser limited the estate to trustees and their heirs in trust to preserve contingent remainders, and to permit the tenant for life to take the profits, with remainder over on his decease; and he afterwards gave other estates for lives with several remainders over, and after each estate for life he interposed the same estate to trustees and their heirs; it was holden, that this shewed his intent to be that the estates to the trustees should be confined to the lives of the several tenants for lives, and consequently that those in remainder took legal estates, there being no other circumstances in the will to shew a contrary intent. *Doe v. Hicks*, B. R. M. 38 Geo. 3. 7 T. R. 433.]

[There may be any number of springing uses within 21 years after lives in being. 2 *Ves. jun.* 241.]

(L) Uses; how destroyed.

(L 1.) By Feoffment, &c.

TO every use there are two incidents inseparable; privity in estate, expressed or implied; and confidence in the person, express or implied. 1 *Co.* 121. b. *Vide post.* (L 6.)

And therefore, a feoffment, upon valuable consideration without notice, destroys the uses. *Vide ante*, (D 2.)

So, a disseisin, or entry, &c. by such as cannot stand seised to uses. *Vide ante* (F).

So, by destruction or merger of the particular estate before the contingency happens, the contingent uses in remainder will be destroyed or defeated. *Semb. Dy.* 340. 1 *And.* 314. *Vide Estate*, (B 15.)

So, if a man raises an use by covenant, &c.

So, if he covenants to be seised to the use of B. in consideration of marriage with his daughter, and before the marriage B. disseises the covenantor, and makes a feoffment, and then the covenantor re-enters, and the marriage takes effect, the uses were destroyed by the feoffment. R. 1 *Co.* 174. b.

So, if a man covenants to stand seised to him and his heirs till the marriage of his son, and then to himself for life, then to the son for life, remainder to the wife and the issue of such marriage, and before the marriage devises the land, this prevents the use arising. *Semb. Mo.* 733.

So, if a man covenants to stand seised to the use of his son for life, and afterwards to such wife as his son shall take, and before his son's marriage makes a lease for years, and then the marriage takes effect, the lease is a revocation of the uses upon the covenant during the term; for the wife shall take subject to the lease, which was made by the covenantor before the contingency. R. 2 *Rel.* 793. l. 30. R. *cont.* 2 *Cr.* 169.

So, if he makes a lease to commence at a future day. *Dub. 2 Rol. 794. l. 10.*

So, if there be a fine of the manor of *B.* to *A.* and his heirs, and of the manor of *C.* to the conusor till eviction of the manor of *B.* by his wife, and then to *A.* and his heirs, and *A.* makes a feoffment of the manor of *B.* before eviction, which afterwards happens, such feoffment destroys the contingent use of the manor of *C.* *Dub. 2 Rol. 795. l. 40.*

So, if the conusor was attainted of treason before the eviction, the contingent use of the manor of *C.* is destroyed. *R. Mo. 375.*

But, if a covenantor to uses grants his reversion in fee to another, who has notice of the former uses, this does not destroy the uses; for the grantee shall be seised to the first uses. *R. 2 Rol. 796. l. 5. Vide ante, (D 2.)*

So, a devise of rent, annuities, &c. out of the land, by the covenantor, before the contingent uses arise, does not destroy them. *Semb. Mo. 733.*

So, if an use be to *A.* for life, remainder to others, &c. a feoffment or other act by *A.* does not destroy the subsequent uses (except where the particular estate is destroyed) where the contingent uses in remainder depending upon it are not vested. *Vide Estates, (B 13. 15.)*

As, if an use be to *A.* for life, remainder to his first son, and before his birth *A.* makes a lease for years, the son, born after, shall avoid the lease after the death of *A.* *2 Rol. 794. l. 20.*

If an use be to the heirs male of *B.* by a second wife, and the covenantor dies, a fine by his heir does not destroy the uses. *2 Lev. 75. Vide post. (L 6.)*

(L 2.) By a power of Revocation.

(L 2.) *What shall be a good one.*] So, to estates raised by limitation of a use, a power of revocation may be annexed, and it will not be repugnant to the estate; as, if a man covenants to stand seised to the use of himself for life, and afterwards to his son in tail, with remainder over, *proviso*, that it shall be lawful for him, during his life, to revoke those uses, and limit new uses. *Co. L. 237. a. 3 Ca. Ch. 66.*

So, if he makes a feoffment, or levies a fine, or suffers a recovery to the use of himself for life, with remainder, &c. and adds such a proviso. *R. Mo. 610.*

So, if he levies a fine, or suffers a recovery to uses, with a power of revocation, and afterwards, by indenture, revokes them, and limits new uses with a power of revocation, this second power is good; for the whole springs out of the recovery. *R. 2 Rol. 262. l. 35. Lane, 119.*

So, the power of revocation may extend only to part of the uses; as, if a feoffment be to the use of the feoffor for life, with divers remainders over, *proviso*, that he may revoke the use to himself for life, and limit it to another, and that the remainders shall stand, it will be good. *Semb. 2 Rol. 262. l. 30.*

It may extend to a revocation of contingent uses, as well as uses in fee. *Vide post. (L 4.)*

So, he may limit a power to a stranger to revoke. *1 Co. 174. a.*

(L 3.)

(L 3.) *By what words.*] And any words which shew the intent of the party are sufficient to create such power of revocation; as, if it be said, *and, if the said A. shall make an estate in fee or tail, &c. then the use shall be, &c.* without saying of what land, it will be a good power; for it shall be intended of the land in the indenture. *R. 2 Rol. 262. l. 40. Vide ante, (D 1.)—Poiar, (A 2.)*

So, if the words are, *it shall be lawful for B. to alter, change, &c. any use and limit new*, it is sufficient, without saying that he shall have power to revoke. *R. Mo. 611.*

Or, *it shall be lawful to limit new uses, and afterwards the fine, &c. shall be to the new, and not to the old uses.* *Mo. 611.*

Or, *that after altering, changing, &c. said uses, the fine shall be to the uses newly limited, &c.* *Mo. 611.*

So, if the words are, *that by any deed he may alter, &c. and after such altering, &c. uses may cease, and, after such time, the feoffees shall stand seised to such new uses as shall be declared, &c.* the party may revoke, and by the same deed limit new uses. *R. 6 Co. 33.*

If the power is in another deed, executed at the same time, it is *tantamount*, as if it was in the same deed by which the uses are limited. *1 Vent. 279.*

So, if the power be to revoke and limit new uses, he may revoke and limit new uses, with the like power *toties quoties*, which all spring out of the same settlement. *R. 1 Sid. 343. R. 2 Rol. 162. l. 35. Semb. Lane, 119. Per B. R. upon a case referred by Harcourt Ld. Chancellor, inter Hele & Bond, Eq. Abr. 342.*

But if a power of revocation be given, without mention of a power to limit new uses, tho' he may revoke, he cannot limit new uses. *1 Vent. 198. D. Lane, 119. R. 1 Sid. 344.*

So, if a power be given to revoke and limit new uses, and he revokes and limits new uses with power of revocation, and afterwards, by a third indenture, revokes and limits other uses, the last uses are not warranted by the first indenture, from which all the uses spring. *Lane, 119.*

For if a man has power to revoke and limit new uses, he can make a revocation only once, if he does not give himself a subsequent power to revoke by the deed of revocation. *1 Co. 173. b. R. Eq. Abr. 342.*

(L 4.) *How a power of revocation shall be executed.*] A person, who has a power of revocation, may shew his intent *tam rebus ipsis quam verbis*; and therefore, if the power be, *that if he is determined to revoke, he by indenture may revoke and limit new uses, &c.* and he, upon marriage with a second wife, covenants to stand seised to the use of himself and his second wife, and the heirs of himself, tho' there be no express signification of his determination to revoke, yet the revocation is good, and the new uses well limited. *R. 2 Rol. 363. l. 10. 10 Co. 144.*

What will be a good revocation, *vide Poiar, (C 1, &c.)*

So, if he by lease and release conveys to other uses, the former uses are revoked. *R. 2 Rol. 263. l. 25. R. Cro. Car. 472. Jon. 393.*

So, if a man, who has power of revocation by an indenture sealed in the presence of three witnesses, covenants, by an indenture sealed in the presence of three witnesses, to levy a fine to other uses, and levies a fine accordingly; tho' he does not take notice of his power, it will be a good revocation; for tho' by itself the indenture, by

by which he covenants, does not make a revocation, because it does not pass any estate, nor raise any use, and the fine is no revocation, for it is not sealed before three witnesses; yet both make only one conveyance, and it is a good revocation. *R. 2 Lev. 149. 1 Vent. 279. Ray. 239. Carth. 25.*

So, if tenant for life, with such a power of revocation, levies a fine, and by deed, more than a month after the fine, declares the uses of the fine to himself in fee, it will be a revocation; for the fine and deed make one conveyance, and therefore, the fine does not extinguish the power. *R. cont. in B. R. but it was reversed in the Exchequer. Per six J. two cont. Carth. 22.*

So, if he makes a lease for years to *A.* and a month after releases to him and his heirs.

So, if he releases to another and his heirs, and the lessee attorns; for the release does not enure as a grant, but as a declaration of uses. *R. Jon. 393.*

So, if the power be, that *if he by writing signify and declare, in express words, his intent to revoke, &c. the uses shall be void*, and afterwards he by his will, without taking notice of his power, devises the land to others, this will be a revocation; for his last disposition to different uses shews his intention to revoke. *R. Ray. 301.*

So, if an estate be limited to *A.* and the heirs male of his body, with a power to revoke, and the next day, reciting that he has given to *A.* and his heirs male, he revokes and limits to him and his heirs male, (without saying, *of the body*;) provided that he pay 1500*l.* to his daughter, it will be a revocation, tho' the estate given to *A.* is misrecited, and there is no reference to the settlement. *R. Skin. 324.*

If the power be, *to revoke, alter, and avoid, &c.* and by deed he says, that his intent is to revoke, alter, or avoid, without saying that he *doth revoke*; yet it will be a good revocation. *R. Mo. 681.*

If a man recites his power imperfectly, and afterwards revokes, it will be good. *R. 3 Lev. 213.*

If the power be, that *if he by writing, subscribed and sealed by him before two witnesses, signifies his intent to revoke*, the uses shall cease, and by will, without taking notice of his power, he devises to other uses, it will be a revocation. *R. Ray. 301.*

If the power be to revoke by deed or will under hand and seal, a revocation by will, tho' not sealed, is good. *2 Ral. 262. l. 15. 3 Keb. 551. Win. 83.*

If it be to revoke by deed, a revocation by lease and release is good, tho' they are two deeds. *1 Lev. 150. Vide Pojar, (C 3.)*

If it is to revoke, by writing under hand and seal, delivered in the presence of three witnesses, a revocation by will under hand and seal, published in the presence of three witnesses, is sufficient, tho' delivery seems intended of a deed. *R. Hob. 312. 1 Vent. 280. R. Lit. 111. Win. 83.*

If to revoke, by writing under hand and seal, a fine with a deed to declare the uses is sufficient; for they make only one conveyance, tho' either of them by itself would be insufficient. *4 Mod. 265. Skin. 35.*

So, a feoffment to such uses, tho' it is executed by livery, which is not in writing. *Semb. Mo. 372. 378.*

If he has power to revoke and limit new uses, which he does; if he afterwards revokes them, he must pursue all the circumstances of the first power. *1 Vent. 198.*

So,

So, a man, who has a power of revocation, may execute it for part of the land at one time, and for part at another time. *Co. L. 237. a. R. 1 Co. 173. b. Mo. 618. R. 10 Co. 86.*

So, he may execute it for part of the estate at one time, and part at another; as, for so many years at one time, and afterwards for the inheritance. *2 Rol. 263. l. 35.*

So, he may revoke contingent uses, as well as uses *in esse*. *R. 10 Co. 86. b. 2 Rol. 792. 2.*

And by the same deed, by which he revokes, he may limit new uses; for the old uses cease *ipso facto* without entry or claim. *Co. L. 237. a. R. 1 Co. 174. R. 6 Co. 32. R. Mo. 682.*

And if he revokes without limitation of new uses, he will be seised in fee, as before, without entry or claim. *Co. L. 237. a. R. 1 Co. 174. R. Mo. 605. 610.*

If he has a power to revoke and limit new uses, he may limit new uses, with a power of revocation, and so *in infinitum*. *1 Vent. 198.*

If, upon the first settlement, a remainder was limited to the king in fee, by a revocation by deed inrolled, the remainder in the king and the other estates are revoked. *R. Jon. 393.*

[L 5.] *What not.*] But if a man covenants to stand seised, &c. and by the same indenture covenants to levy a fine, and make other assurance to the same uses, and adds a proviso, *that if he, by writing, &c. revokes or otherwise limits, &c. any of the uses or estates created by the same indenture*, then he shall stand seised to such uses, &c. if he levies a fine, or makes a feoffment to the covenantees for performance of the said covenants, to the uses in the same indenture generally, this does not amount to a revocation; for it was intended only for a further assurance. *R. 2 Rol. 795. l. 10.*

When a defective revocation shall be aided in equity, *vide Chancery, (406.)*

So, if a man, by subsequent deed, explains the intent of the former; as, if the uses by the first deed are declared to the mortgagee for security of money, and it is afterwards explained by another deed, that the mortgagor shall take the profits in the mean time, this does not amount to a revocation. *R. 2 Rol. 793. l. 10.*

So, if a man, who has a power of revocation, makes his will, and devises the same estate to others, tho' his intent appears to make a different disposition; yet, if the will is not executed with all the circumstances of the power, it will not be a revocation. *R. 3 Ca. Ch. 66. Vide infra.*

The power of revocation is in the nature of a condition, and it cannot be effectual, if all the circumstances prescribed by the power are not pursued. *R. 3 Ca. Ch. 66.*

So, a power of revocation must be strictly pursued; and therefore, if the power be, that he may revoke by deed indented, subscribed and sealed by him in the presence of three witnesses, all the circumstances must be observed. *R. 10 Co. 144. a.*

By a writing subscribed by three witnesses, a writing subscribed by two only is not sufficient. *R. Lit. 23.*

If it be that he may revoke, by writing sealed and delivered before three witnesses, a will delivered before three witnesses is not sufficient, tho' sealing is not essential to a will. *Hob. 312.*

That by writing, &c. he may revoke and limit new uses, if he pleads that he enfeoffed A. to such uses, and avers that the feoffment was by writing, it is not sufficient; for it does not appear that the uses are declared by writing. R. Mo. 370. 391.

If it be, that he may revoke by deed indented to be inrolled, this is the same, as by deed indented and inrolled; for it will be no revocation till inrolment. R. 1 Co. 173. b.

Or, by deed inrolled in any of the king's courts, and a subsequent clause says, that from inrolment in Chancery the uses shall be revoked; if the deed is inrolled in B. R., yet the uses are not revoked till inrolment in Chancery. R. 1 Co. 173.

If it be, that he may revoke upon tender of a guinea, if a deed is executed to other uses without tender of a guinea, it will be no revocation. 3 Ca. Ch. 70.

If a power be by indenture to revoke upon tender of 10s. to A., and by another indenture there is a power to revoke the uses of other land upon tender of 10s. to A., tender of 20s. to A. to revoke the uses of both indentures is not good. R. 9 Co. 106. b.

If it be, to revoke upon tender to A. at Westminster, tender there, in the absence of A. and without notice to him, is not good. R. Mo. 602.

Yet the acceptance of the party may aid an improper tender; as, if the power is to revoke upon tender of 12d. to A. in the Temple, and he tenders, and A. accepts it in another place. Per Powel, 3 Ch. Ca. 68. If A. be privy to the deed, otherwise, if a stranger.

So, a power of revocation, which depends upon a thing personal and individual, cannot be executed by another; as, if a man covenants to stand seised to uses, with a proviso, that if he is minded, and signifies his mind by writing under his proper hand and seal, &c. he may revoke, &c. and afterwards he is attainted of treason, the king cannot make a revocation. R. 7 Co. 13. a.

Or, if he be minded, and declare such his intent by writing under hand and seal. R. 1 Vent. 129. 1 Mod. 16. 1 Lev. 279.

Or, proviso, that if he tender a ring, &c. to the said W. declaring his intent to be to revoke; for it is personal. Dub. for the Court was divided. Latch, 25. Jon. 134. Acc. 1 Vent. 129. 2 Rol. 393.

But if the power be to revoke upon tender of a gold ring, &c. and he, who has the power, is attainted of treason, the king may make the tender. R. 7 Co. 13.

And the king may depute others by letters patent to make the tender. 7 Co. 12. a.

And their tender and certificate to the Exchequer is sufficient without office. R. 7 Co. 14. b.

And immediately upon the tender, the uses are determined and null. 7 Co. 14. b.

Yet the tender must be in the lifetime of the person attainted. 1 Vent. 132.

So, if the power recites, that he being apprehensive that cestui que use may be prodigal, &c. and therefore he will keep the reins in his own hands, and intends, if he offers a ring with an intent to revoke, &c. the uses shall be revoked, if he is attaint, &c. the king may make tender of the ring, and thereby revoke; for the recital is only a flourish, and the tender is the substance. R. 7 Co. 13.

(L 6.)

(L 6.) *When a power of revocation will be extinguished or destroyed.* If a man who has a power of revocation, before execution of his power, makes a feoffment, levies a fine, or suffers a recovery of the land, it destroys and extinguishes his power. *Co. L. 237. a. R. 1 Co. 112. R. 1 Co. 174. Vide Poiar. (D—E).—Ante, (L 1.)*

And his power of revocation, as well as of limiting new uses, will be extinct. *R. 1 Co. 112.*

So, if he levies a fine, and afterwards by deed, with all the circumstances of the power, declares the uses of the fine, the power is extinct; for the power cannot be revived by a subsequent deed, which was extinguished by the fine before. *Adm. 1 Vent. 280. R. per three J. Withens cont. 1 Vent. 363. 371. But this judgment was afterwards reversed by six J. against two in error, Carth. 23.*

So, if he makes a lease for life or other estate of freehold, this suspends the power, so that he cannot revoke during the life. *R. 2 Rol. 263. l. 40. per one J. but dub. by another, if the power was not extinguished. 1 Vent. 42.*

So, if he makes a lease for years, and levies a fine for confirmation of the lease, this suspends the power during the years. *Mo. 618. (Vide infra.)*

If he makes a lease for years, and the lessee attorns, and he a month after grants the reversion to the lessee, it will be a revocation; for tho' the lease suspends his power, the grant of the reversion does not enure as a grant, but as a declaration of a new use. *R. Jon. 393.*

So, if he releases his power to him who has an estate in the land, in possession, reversion, or remainder, the power is extinguished, and the estate defeasible by the power is made absolute. *R. 1 Co. 113. a. 174. a.*

Tho' the power be future, viz. to revoke after the death of B. without issue. *Semb. 1 Co. 112. b.*

So, a defeasance by the parties to the same deed may annul the power. *R. 1 Co. 113. a.*

But if a man has no interest in the land, nor will have by *cesser* of the estate, his fine or feoffment, being collateral to the land, does not extinguish his power; as, if A. upon a feoffment reserves a power to B. to make a revocation, &c. a fine or feoffment of the land by B. does not extinguish his power. *Co. L. 237. a. 1 Co. 174.*

Nor, his release. *1 Co. 174. a.*

If A. covenants to stand seised to the use of the heirs male of his body by a second wife, and dies, a fine or recovery by his son and heir by the first *venter* does not destroy the power of revocation or the contingent uses. *Adm. 2 Lev. 75.*

So, if a man, who has a power of revocation, levies a fine, or makes a feoffment of part of a land, it extinguishes his power only for that part. *R. 1 Co. 174. Co. L. 237. a.*

But if a man, who has a power of revocation, makes a lease for years pursuant to a power in the same conveyance, this does not suspend his power of revocation as to the reversion. *R. Mo. 788. Jon. 393. 1 Rol. 473. l. 10.*

So, if he makes a lease for years not in pursuance of a power. *Mo. 614. Per Walmsly. Mo. 618. Dub. Mo. 788. R. 2 Rol. 263. l. 30. Cro. Car. 472. Jon. 393.*

So, if the power be to make another estate in fee or tail, a covenant to stand seised to the use of his wife for her life, does not alter his power. *R. 1 Ch. R. 113.*

So,

So, if a man, having an estate for life, with a power of revocation, by deed covenants to levy a fine to such uses, and afterwards levies a fine accordingly, this does not extinguish his power, and the whole makes but one conveyance. *R. 1 Vent. 279. Ray. 239. 2 Lev. 149. Skin. 35. 184.*

(M) What Uses are suppressed as superstitious.

BY the *st. 23 H. 8. 10.* (which was the first statute against superstitious uses) all feoffments, &c. to the use of parish churches, &c. to have perpetual *obits*, or find a priest, &c. are within the mischief of alienation in *mortmain*, and therefore all such or like uses above twenty years shall be void.

By the *st. 1 Ed. 6. 14.* all lands, rents, &c. to find stipendiary priests, &c. or for maintenance of anniversary *obits*, or like purposes, or any light, lamp in church, &c. shall be vested in the king; and if but part of the issues go to maintain such anniversary *obit*, lamp, &c. the king shall have the same in the nature of a rent-charge, &c.

Lands in tail, or for life, for such superstitious use, are within the statute, as well as estates in fee or for years, which only are mentioned. *R. 4 Co. 106. b. Godb. 309.*

So, lands given to a wife, &c. for such intent, and it will not be intended in consideration of blood, &c. *R. 4 Co. 105.*

So, land given to a son, upon condition, that if he does not find, &c. the feoffor may enter, tho' it is not said, to the intent to find. *R. 4 Co. 107. a.*

So, if land is given to a parson and his successor to find, and he leases for life, and with the rent finds, &c. till the *st. 1 Ed. 6.* made, the king or his patentee may enter. *R. Dy. 337. b.*

So, if land be given, *that prayers be made for the soul of the deceased*, it will be within the statute, which says, *or like uses.* *R. 4 Co. 112, 113. 1 Rol. 417.*

Tho' the prayers are to be made in *Drapers'-Hall*, &c. and not in a church or chapel. *4 Co. 114. a.*

Or, by the prisoners in *Newgate*, upon the anniversary of his death. *4 Co. 116. a.*

Or, for maintaining a popish priest. *2 Vern. 266.*

If land of *20 l. per annum* is given to the intent to find a priest, &c. the whole shall go to the king, tho' only *10 l.* is to be paid to the priest. *R. 4 Co. 109, 110. b. 113. b. 115. b. R. Mo. 131. 264.*

So, if it be given to find a priest, and for twenty poor men, without ascertaining how much shall be to one, how much to the other. *R. 4 Co. 111. 113. a. b.*

Tho' *10 l.* was usually paid to the priest, and *10 l.* to the poor. *R. 4 Co. 111. a. 113. b. R. Mo. 264.*

So, if it be given, with *10 l. to find a priest, and with the residue* to supply an use depending thereon; as, the finding vestments, saying *mass*, &c. *R. 4 Co. 112. 114. a. R. Mo. 129. 4 Co. 116. Latch. 38.*

So, if it be given to find so much for one use, and so much for another, (where all are superstitious,) in whatever manner it is limited. *R. 4 Co. 112. a.*

Or, given to find a priest, and that he shall find a grammar-school, and for it shall have *10 l.* for his salary; for the good use is derived out of the superstitious use. *R. 4 Co. 113. a.*

If given to find a priest, who shall have 5 *l.* *per annum*, and what remains to the repair of the church; for the superstitious use is certain, the good use uncertain. *R. Cro. Car. 249. 456.*

But if land of 20 *l.* *per annum* be given to the intent, that the feoffees pay 10 *l.* to a priest, only the 10 *l.* is given to the king. *R. 4 Co. 110. b. 113. b. R. Mo. 694.*

Or, if it be given to find a priest, and that he shall have only 10 *l.* *per annum*, and the rest shall be for the poor. *R. 4 Co. 110. b. R. Mo. 131.*

Or, given to raise 10 *l.* for a priest, and to find vestments, &c. tho' it does not ascertain how much shall be for that purpose. *R. 4 Co. 109. b. Mo. 131.*

Or, *Black Acre* be given for an *obit*, and *White Acre* for the *obit* and poor; proviso, that if *Black Acre* does not raise 10 *l.* for the *obit*, it shall be supplied from *White Acre*. *R. Cro. Car. 249.*

So, if by exprefs words or implication, it appears that the residue was intended for the devisee. *R. 4 Co. 116. b.*

So, if the whole land was intended for a superstitious use, but only a part was conveyed for that purpose, that part only shall go to the king, tho' the whole was employed for that purpose. *R. 4 Co. 115.*

So, if land is charged with a rent of 20 *l.* to find a priest, &c. the rent only shall go to the king. *R. 4 Co. 110. b. 116. b.*

So, if money be devised to a dean and chapter to find a *chantry*, and they oblige themselves to do it, and afterwards purchase land, and employ the profits for a priest, *obit*, &c.; but there is no settlement for such purpose, they are not given to the king. *R. 2 Cro. 51.*

If land was given to find an *obit*, &c. but none was found within five years before the statute of 1 *Ed. 6.* the land was not given to the king. *Dy. 368. 4 Co. 114, 115.*

So, uses limited since that statute are not thereby given to the king. *Per Holt, M. 4 W. & M. 1 Sal. 163.*

So, chantries in reputation, without colour of legal foundation, are not given to the king. *R. 4 Co. 107. b. 108. b. 2 Cro. 51.*

Otherwise, if there was colour of a good foundation, tho' it be defective. *R. 4 Co. 108. a.*

So, a devise upon a trust for a superstitious use, tho' it is void; yet it does not result to the heir, or to the king, but it shall be applied to a good use. *R. 1 Sal. 163. 2 Vern. 266.*

As, if it be for independent lectures. *2 Vern. 267.*

Or, for presbyters to promote the discipline of the church of England, in Scotland. *R. 2 Vern. 266.*

(N) Charitable Uses.

(N 1.) What are.

(N 1.) *Relief* BUT charitable uses were not given to the king, nor of the poor.] suppressed by the *st. 23 H. 8. 10.* nor, by the *st. 25 H. 8. 26 H. 8. or 28 H. 8.* which take away the authority of the pope, nor by the *st. 27 H. 8. 31 H. 8. 37 H. 8. or 1 Ed. 6. 14* which suppress abbeys, chantries, &c. *R. 1 Co. 24. Porter, R. 4 Co. 111. a.*

And therefore, by the *st. 43 El. 4.* commissioners may be to inquire of

of and redress the misemployment, &c. of lands, goods, &c. given for the charitable and godly uses therein rehearsed.

And in the same statute it is allowed, for a good and charitable use, if lands, goods, &c. are given, &c. for the relief of aged, impotent, and poor people. 1 Co. 24. a.

So, if the gift be to the poor of such a parish, without saying, that they are aged or impotent; for poverty of itself is sufficient. Duke, 132.

Or, to such an hospital. Ibid.

Or, to all not assessed to the subsidy; for they are poor. Ibid.

So, in whatever manner the relief be; as, if it be to provide bows and arrows for the children of the poor; for it is an easement to the parent, who ought to find them. Ibid.

For erecting cottages for the poor, with four acres of land to each. Ibid.

For making conduits to alms-houses. Ibid.

For building an house in which they may take alms. Ibid.

Or, maintaining a common laundress in an hospital, &c. Duke, 132.

Or, a chaplain for prayers, &c. Ibid.

So, for providing arms for their defence. Ibid.

Or, increase of diet upon festivals, &c. Duke, 133.

But it shall not be allowed for a good use, if it be for relief of all the aged and impotent in such a parish; for that comprehends the rich as well as the poor. Duke, 132.

Or, to the poor in general. Ibid.

Or, to the religious, when the time permits, and in the interim for the poor. Duke, 133.

So, if it be for weapons for the poor; for they are not necessary. Duke, 132.

For putting up seats for begging; for it is unlawful. Duke, 133.

Yet the *Chancery* may settle such uses as the commissioners, by the *st. 43 Eliz.* cannot. *R. 2 Lev. 167.*

[If one grants a rent-charge of 20 l. *per annum* for a charity, toward the support of poor old men, and then grants the lands, &c. to A. and his heirs, the heir of the grantor of the charity, and not the grantee of the lands, shall nominate the old men. *Attorney-General v. Rigby, M. 1732, 3 P. W. 145.*]

(N 2.) *Soldiers or mariners disabled.*] So, by the *st. 43 Eliz.* it is rehearsed, and will be allowed for good, if the gift be for the maintenance of *sick and maimed soldiers and mariners.* 1 Co. 26. a.

So, if *they are sick or maimed*, in the disjunctive. Duke, 134.

If he served as an officer or common soldier, priest or volunteer. Duke, 133.

As, a servant, victualler, artificer, pilot, &c. in a merchant's or king's ship. Duke, 133.

Tho' the soldier or mariner be an alien. Ibid.

But the statute does not extend to soldiers beyond the time of their sickness. Duke, 134.

To the wife, issue, or servants of a disabled soldier or mariner. Duke, 133.

To bargemen, wherry-men, owners of, or passengers in, a ship. *Duke, 133.*

Nor, victuallers, &c. who voluntarily attend the army. *Ibid.*

If he be maimed in a foreign ship or service. *Ibid.*

Or, by way of punishment for an offence. *Duke, 134.*

(N 3.) *Schools.*] So, if a gift be for schools of learning, free-schools, or scholars in the university. 1 Co. 26. a.

Schools for writing, languages, music, mathematics, &c. for they are schools of learning.

If it be for furniture, &c. of the house, &c. provision for the master, usher, &c. *Duke, 134.*

But the statute does not extend to schools for dancing, fencing, &c. *Ibid.*

Or, for instructing in the catechism; for this is a matter of religion. *Ibid.*

Or, such as are not free-schools. 2 Vern. 387.

Nor, to a gift for scholars in any other place than Oxford and Cambridge; as, in the college of physicians. *Duke, 134.*

Or, in Oxford, Cambridge, or elsewhere, at the discretion of the trustees. *Ibid.*

(N 4.) *Bridges, &c.*] So, if a gift be for repair of bridges, ports, havens, causeways, churches, sea-banks, and highways. 1 Co. 26. a.

And such gift will be good, tho' another be bound by covenant or prescription to repair.

If the gift be for the repairing of a common pond or watering-place. *Duke, 135.*

For lights to direct ships to the haven. *Ibid.*

(N 5.) *Orphans.*] So, if a gift be for preferment and education of orphans. *Duke, 135.*

Or, of a bastard; for he has no parent. *Ibid.*

So, if it be for horses to instruct orphans, who hold in chivalry, to ride. *Duke, 136.*

And a woman continues an orphan, tho' married, till age of consent. *Duke, 135.*

But a servant or apprentice is no orphan; for his master is in loco parentis. *Ibid.*

(N 6.) *House of correction.*] So, if a gift be for the relief, stock, or maintenance of a house of correction. 1 Co. 26. a.

Or, for building a house of correction. *Duke, 136.*

(N 7.) *Poor virgins.*] So, if a gift be for the marriage of poor maids. 1 Co. 26. a. Cro. Car. 525.

Or, for a wedding dinner or apparel for them. *Duke, 136.*

And it shall be allowed to such as are poor, tho' they have wealthy relations. *Ibid.*

But not to those who have rich parents, or legacies. *Ibid.*

Or, marry against their parents' consent. *Ibid.*

Or, are incontinent. *Ibid.*

So, provision for a wedding-ring for a poor virgin will not be a good use; for the husband ought to provide it. *Ibid.* (N 8.)

(N 8.) *Decayed tradesmen.*] So, if a gift be for the support of tradesmen, handicraftsmen, and persons decayed. *Duke, 136.*

As, if they become decayed by negligence, fire, fraud of servants, &c. *Ibid.*

Bankrupts in custody after submission to the laws. *Ibid.*

But the statute does not extend to tradesmen set up above five years. *Ibid.*

Nor, to bankrupts who abscond. *Ibid.*

Or, persons in decay by suretyship, &c. *Ibid.*

(N 9.) *Prisoners and captives.*] So, if it be for relief or redemption of prisoners or captives. *Cro. Car. 525.*

As *Christians* captive to the *Turks*. *Duke, 136.*

Persons in execution, or upon *præmunire*. *Ibid.*

But the statute does not extend to persons captive to a *Christian* prince in war. *Ibid.*

To persons in prison for contempt. *Ibid.*

Nor, to the wife or issue of a prisoner. *Duke, 137.*

(N 10.) *Aid of poor inhabitants, &c.*] So, if a gift be for the aid and ease of poor inhabitants, in payment of fifteenths, setting out soldiers, or other taxes. *1 Co. 26. a.*

So, if it be to make hue and cry, watch and ward, &c. *Duke, 137.*

Other charities not superstitious.] But the statute does not extend to a gift for discharge of subsidies; for they are not paid by the poor. *Duke, 137.*

Nor, for discharging fines for escape, robbery, &c. *Ibid.*

So, if a gift be for the provision of a preacher, &c. it will be a charitable use within the equity of the statute. *R. Poph. 139. Duke, 32. 109.*

So, a gift for the maintenance of a chaplain or priest for divine service will be a charitable use, and in the direction of *Chancery*, tho' not within the power of the commissioners. *Duke, 109. 2 Lev. 167.*

So, a gift for a lecture or sermon. *2 Ca. Ch. 18.*

For sixty ejected ministers. *R. per Commissioners 1689, and decree cont. reversed, 1 Ver. 249, 250. 2 Ver. 105.*

(N 11.) What shall be a good Appointment to a Charitable Use.

If lands or goods are given, limited, appointed, or assigned to a charitable use, it is sufficient, tho' it be not pursuant, in all respects, to the direction of the law; as, if the gift be to persons not capable by law to take; as, if land be devised to the churchwardens of *D.*, tho' they cannot take lands. *Duke, 115. 139. Vide Chancery, (2 N 2.)*

Or, to the parishioners of *D.* or the parish of *D.* *Duke, 139, 140.*

Or, parson and churchwardens to sell. *Duke, 81.*

Or, parson and his successors, tho' he is no corporation. *Duke, 139.*

So, if it be to the poor of an hospital, tho' they are not incorporated. *Duke, 81. 115.*

So, if *10l. per annum* be given for a sermon in *A.* without saying to whom. *R. 2 Ca. Ch. 18.*

So, if it be to a corporation, which is misnamed. *R. Ca. Ch. 267.*

Or, to a corporation to the use of another; tho' a corporation cannot be seised to an use. *Duke, 81. 138.*

To an idiot, *feme-covert*, bankrupt, recusant, &c. *Duke, 138.*

To such charitable uses as he had by writing directed, and no such writing is found, it will be a good appointment, and the king may direct the application upon a bill in equity. *R. 1 Ver. 225.*

So, if he gives the surplus of his estate for the good of poor people for ever, without saying whom. *1 Ver. 225.*

So, if a gift or appointment be made to a charitable use by an improper conveyance; as, if land was devised before the *st. 32 & 34 H. 8.* tho' not devisable by custom. *Per two J. Mo. 889.*

If a rent be reserved to *A.* for the use of the poor, tho' *A.* is a stranger. *Duke, 140.*

If a copyhold be given to the use of the poor, &c. tho' there is no surrender. *R. Mo. 890. Ray. 249. 2 Ver. 454.*

If a devise was by a *feme-covert*, of goods, which she has as administratrix; for an administrator had the goods to dispose in *pious usus.* *R. Mo. 882. 2 Ver. 454.*

So, if by voluntary agreement between mariners *4d.* a month be allowed out of their wages for maimed mariners, it will be a good limitation within the statute. *R. Mo. 889.*

If a term be devised to *A.* for life, remainder to charitable uses, tho' there can be no remainder of a term. *Duke, 140.*

If a devise be by tenant in tail before a recovery suffered. *Ray. 249. R. 2 Ver. 453. Vide Chancery, (2 N 2.—4 S 2.)*

So, it will be good against him in remainder. *R. in Chanc. inter Burdet and Inhab. of White-Chapel, 2 Ver. 755.*

So, if a woman settles land with a power of revocation, and gives instructions in writing for a settlement to charitable uses, but dies before the settlement, it shall be a good appointment, tho' no revocation. *Eq. Ca. 138.*

But a disposition to a charitable use by him, who has not ability to grant, shall not be decreed; as, by an idiot, lunatic, &c. *Duke, 114. 138.*

By an infant, *feme-covert*, &c. *3 Ch. R. 152. Duke, 138.*

By a bankrupt. *Duke, 138.*

So, if a daughter gives lands to a charitable use, which she has by descent, if there was no trust in her father so to dispose, an after-born son may avoid it. *Duke, 138.*

So, a devise to a charitable use by a tenant in *capite* will be void for a third part. *R. Ray. 249. R. Cro. Car. 525. Cont. 2 Ver. 454.*

So, a devise by a nuncupative will will be void; for the *st. 29 Car. 2.* has repealed the *st. 43 El. 4. pro tanto.* *R. 1 Sal. 162. Eq. Ca. 44.*

Tho' made before the *st. 29 Car. 2.* if the testator died after. *1 Sal. 163. Semb. 3 Ch. R. 153.*

So, a devise by a will, not executed in the presence of three witnesses, since the *st. 29 Car. 2.* will be void, tho' it be to charitable uses. *R. 2 Ver. 598.*

[There must be a will duly executed to create a charitable use, and Chancery will not set up a trust for a charity without a declaration in writing; for charitable uses are within both the clauses of the statute of frauds, the clause of devises, and the clause of declarations of trust. *Addington v. Cann, T. 1744, 3 Atkyns, 141.* So,

So, a devise that land shall be sold for payment of legacies, the residue to charitable uses, is not a disposition of the land itself. *R. Cro. Car.* 526.

So, a devise with remainder to charitable uses, with intent to create a perpetuity, shall not be decreed. *1 Ver.* 161, 162.

(N 12.) *How expounded.*] A gift or appointment to a charitable use shall be liberally expounded; and therefore, where land of such a value is devised, the whole shall be employed, tho' the value is improved. *Vide Chancery*, (2 N 1, &c.)

If a manor is charged with 1000*l.* to put out apprentices in such parish as his executors shall appoint, tho' the 1000*l.* is paid to the executor of the donor, the manor is not discharged till it is vested in trustees for the intended charity. *R. Ch. R.* 187.

[If there be a devise of the whole profits of an estate to charities, the charities shall have the increased rents. *Ambler*, 190.]

[If there be a devise to pay debts and annuities, to build a house for six poor people, and to pay them 2*s.* 6*d.* a-week each, after debts paid; if there be a saving and increase of rents, they shall go to the charity. *Id.* 201.]

[A devise to establish a *Yeshuba* to instruct in the Jewish religion, was held not to be supportable in that mode, but good as a charity, to be disposed of by the crown. *Ibid.* 228.]

[If a legacy be given to the poor inhabitants of *St. Leonard, Shore-ditch*, it shall go to the poor not receiving alms. *Id.* 422.]

[If a legacy be given to the poor, and it appear that the testator was a *French* refugee, the court will direct it to be given to poor refugees. *Ibid.*]

[A devise being given in augmentation of the charitable collection for poor dissenting ministers living in any counties in *England*, and it being proved that there were three distinct societies of dissenters; it was held that the devise was good, and should go to the poor ministers of each. *Id.* 524.]

[If there be a devise of a residue in trust for charitable uses, without specifying any, the bequest is good, and the crown may appoint the uses. *Id.* 712.]

(N 13.) *By whom the appointment may be.*] Every one having ability to make a grant or devise, may appoint to charitable uses. *Vide ante*, (N 11.)

So, where an intestate had *bona notabilia*, after administration granted and an inventory exhibited, upon citation of the administrator, the judge of the ecclesiastical court might direct a particular sum, according to the circumstances of the estate, to such charitable uses in particular as he pleased. *4 Inst.* 336.

And this was to be done by public act of the court without fee, and then the administrator was bound to do it. *Ibid.*

[(N 13.) *How appointed.*]

[By *stat.* 9 *Geo.* 2. *c.* 36. after *June* 24th, 1736, no appointment shall be made of any manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal, nor of any sum of money,

money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatever, to be laid out in the purchase of any lands, tenements, or hereditaments, to any person, body politic, or corporate, or otherwise in trust, or for the benefit of any charitable uses whatever; unless in the case of lands, &c. and personal estate, (except stock in the public funds,) such appointment be by deed indented, sealed, and delivered in the presence of two or more creditable witnesses, 12 calendar months at least before the death of the donor or grantor, (including the days of the execution and death,) and inrolled in *Chancery* within six months next after the execution; and in the case of stocks, unless the transfer be made in the public books six calendar months at least before the death of the donor or grantor (including the days of transfer and death); and unless such appointment be made to take effect in possession for the charitable use intended, immediately from the making thereof, without any power of revocation, reservation, trust, condition, limitation, clause, or agreement whatever, for the benefit of the grantor or of any claiming under him. S. 1.]

[Any grant, &c. made in any other way to be absolutely void. S. 3.]

[This not to extend to prejudice any college in either of the two universities, nor the colleges of *Eton*, *Winchester*, or *Westminster*, provided that no college shall hold more advowsons than shall be equal to a moiety of their fellows in number. S. 4 & 5.]

[If a man by will give 500*l.* out of his personal estate to trustees in trust to lay out part in building a school-house, and school-master's house, and direct that the purchase of the ground and the expence of building shall not exceed 200*l.*, and that the remaining 300*l.* be laid out in land or *real security* for the master's maintenance, the last is void by this statute, and ground may not be purchased with the 200*l.*; but if the parish have lands, it may be laid out in building on them. 3 *Atkyns*, 806. 2 *Vesey*, 547.]

[If a man give a legacy to his executors, and then devise a copyhold to *A.* he paying the executors 1000*l.*, and give the residue of his estate to a charity, this 1000*l.* is a charge on the real estate, and the devise of it void by the statute. 1 *Vesey*, 108.]

[If a man give his real estate to trustees to sell, and with the produce and his personal estate to pay debts and legacies, and (*inter alia*) to purchase freehold land for a fund for an annuity to preach a sermon and to keep a tomb-stone in repair, it is within this statute and void. 1 *Vesey*, 320.]

[If mortgagee in possession under *habere facias* devise all money due on the mortgage to a charity, tho' the heir at law of mortgagor insists to redeem, it is within this statute. 2 *Vesey*, 44.]

[But if by his will, *before* the statute, he had devised lands to trustees for a charity, and by codicil made *after* the act, devised the *same* and other lands, to the same and other trustees, and under the same trusts, and made alterations in other parts of his will, and confirmed the rest, the lands devised by the will are not within the statute. 1 *Vesey*, 178. 186.]

[And if a man devise the residue of his real and personal estate to *A.* for life, &c. and then to trustees to *erect* an hospital; as, to his real estate

estate it is void, but not as to the personal, tho' he had mortgages; and to *erect* means to *found* as well as to *build*. 2 *Vesey*, 182.]

[If a testatrix bequeath a sum of money to be laid out under the direction of the minister and churchwardens for the purpose of erecting a free-school within the parish, it is void, tho' there be a piece of waste land in the parish on which an old building stands, which has formerly been a free-school. *Ambler*, 751.]

[Testator gave all his real and personal estate in trust, that a commodious and proper house should be taken on lease, at such yearly rent as should be agreed on, or otherwise, as the trustees should think fit, as a school; and that the children and grand-children of some of his relations should be placed there from the age of 7 to 14, then to be put out apprentices; also, that such other children as the trustees should think fit should be placed at the same school; and he directed an inscription, visitation, &c. This trust held void under the act as to the general purpose of a permanent charity; but good as to the particular bounty to the relations to the extent of children and grand-children of such of the stocks specified, as were in being at the testator's death; and while the school was kept open for them, that other children might be educated there. *Blandford v. Thackerell*, 2 *Ves. jun.* 238.]

[The stat. meant to prevent the adding to land already in *mortmain*. *Ibid.* 241.]

[Charitable bequest of money due on mortgage void. 2 *Ves. jun.* 279.]

[Distinction between the *stat. of Mortmain* and the 12 *W. 3. c. 4.* concerning Roman Catholics: the former has the words "charge, or incumbrance," which are not in the latter. *Ibid.* 283.]

[A. devised to B. preacher of the meeting-house of C. for life, on condition that he should convey the premises to trustees, to take place after B.'s death, for the use and support of the preaching of the word of God at the meeting-house for ever, and in case the preaching there should be discontinued, then over to a charity-school: it was holden that B. took an estate for life, tho' the devise over was void under the statute. *Doe v. Aldridge*, B. R. E. 31 *Geo. 3.* 4 *T. R.* 264.]

(N 14.) Jurisdiction for Charitable Uses.

(N 14.) *By commission.*] How relief shall be in *Chancery* for charitable uses, *vide in Chancery*, (2 N 1, &c.)

[The court, on an information of *Attorney-General*, may direct the election of a master of a free-school of royal foundation, and this is not interfering with the visitatorial power. *Attorney-General v. Shrewsbury*, P. 1726, *Bunb.* 215.]

By the *st. 2 H. 5. 1.* the ordinary shall inquire of and reform the government of hospitals of the king's foundation by commission, and return the inquisition taken thereon into *Chancery*, and other hospitals *ex officio*.

By the *st. 39 El. 9.* commissions might be awarded to inquire of lands or goods given to hospitals or charitable uses, &c. *But this is repealed by 43 El. 9.*

By the *st. 43 El. 4.* lord chancellor, &c. may award commissions to the bishop of the diocese, his chancellor, and others, &c. or any four

four of them, to inquire by the oaths of 12 men, or other lawful means, of all gifts, &c. to the charitable uses there specified, and of all abuses, misemployments, &c. of lands, goods, &c. given to the said charities; and after inquiry, &c. calling the parties interested, to set down such decrees, &c. that the lands, goods, &c. may be duly employed for the charitable uses for which given.

And all decrees, &c. shall be certified into *Chancery*, under the seals of the commissioners in the time limited by the commission; and shall stand good till altered by the lord chancellor on complaint by party grieved.

So, the king himself may name commissioners, or sign the commission, as well as the chancellor. *Duke, 144.*

Or, commissioners of the great seal. *Cont. per Mo. Duke, 144.*

The commission must be under the great seal. *Duke, 144.*

And conform to the words of the statute. *Duke, 146.*

It must be awarded to the county where the land lies. *Duke, 145.*

Or, where goods are to be employed. *Duke, 149.*

If land in one county is given in charitable uses in another, there must be several commissions to both counties. *Duke, 145. 148, 149.*

So, if the land lies in several counties. *Duke, 145. 148.*

Or, the rent issues out of land in several counties. *Duke, 145. 148.*

So, if the lands or goods are in a county palatine and the employment out of it, or *vice versa*, there must be commissions under both seals. *Duke, 145.*

[N 15.] *Who may be commissioners.*] There must be five commissioners at least. *Duke, 146.*

And the bishop of the diocese, if he is *in esse*, must be a commissioner, otherwise it will be void. *R. per four J. Duke, 63.*

But a bishop elect need not be named a commissioner, if he be not consecrated. *Duke, 145.*

Nor, a suffragan. *Duke, 145.*

Nor, a consecrated bishop, if he is concerned in interest; as, if goods of an intestate, given to charitable uses, are in his hands as ordinary till administration granted. *Duke, 145, 146.*

So, if the bishop is named, the other commissioners may act without him. *Duke, 63. 117. 145.*

So, any one of good fame may be a commissioner. *Duke, 117. 145.*

So, an alien friend may be a commissioner. *Duke, 145.*

So, a person indicted for a petty misdemeanor; as, a riot, &c. *Duke, 145.*

Outlawed, if the outlawry be reversed; for that disaffirms the outlawry. *Duke, 146.*

Citizen or burgess, tho' the charitable use is for the benefit of the city or borough. *Duke, 147.*

But by the *st. 43 El. 4.* commissioners ought to be of good and sound behaviour; and therefore a person, convicted of treason, felony, or misprision, cannot be a commissioner.

Nor, one convicted for coinage, barrettry, simony, &c. *Duke, 145.*

Or, for acquitting of a felon, against evidence, when he was a juror. *Duke, 145.*

Nor,

Nor, one outlawed or excommunicated at the time of the commission, tho' afterwards pardoned or absolved. *Duke, 146.*

Nor, an infant at the time of the commission; tho' he afterwards comes to full age. *Duke, 146.*

So, a person interested cannot be a commissioner; as, an executor or administrator of the goods given. *Duke, 146.*

Or, any one who claims the reversion or remainder of the lands given. *Duke, 146.*

Nor, a member of a particular corporation, to whom the charity is given; as, one of the *merciers'* company, &c. where the gift is to such company. *Duke, 147.*

(N 16.) *What inquisition shall be good. As to a gift to a charitable use.]* So, commissioners may make inquiry by all lawful means of all gifts, &c.

And therefore inquiry, by examination of witnesses, rentals, accounts, prior inquisitions, as well as by jury, will be good. *Duke, 150.*

Or, by the commissioners' own knowledge. *Duke, 150.*

And an inscription upon the tomb of the donor of a charitable use is sufficient.

And by such means they may supply a defect in the finding of the jury in the circumstances of the gift; as, that a gift for poor tradesmen was for such sort of tradesmen. *Duke, 150.*

That the misemployment found was for so long time. *Ibid.*

And it is sufficient if 12 jurors agree, tho' 16 are impanelled. *Ibid.*

So, an inquisition will be good, tho' it does not find all the circumstances of the gift, if the substance be found; as, if the gift be found *quibusdam ignotis*, or *per quendam ignot.* *Duke, 149.*

So, if it finds a gift variant in circumstances from the truth; as, if it be found to be made by fine, feoffment, &c. when it was by will, or other conveyance. *Duke, 149.*

So, it is sufficient if the inquisition finds the general use, tho' it varies from the particular; as, if it finds a gift for books for poor scholars, when it was for gowns for them; for the gift for poor scholars is the general use. *Ibid.*

Or, for stones for the highway, where the gift was for gravel. *Ibid.*

Or, finds a gift for poor scholars generally, where it was for two poor scholars in the university. *Ibid.*

Or, a gift for such an use, where it was for such and other uses, it is sufficient for so much. *Ibid.*

(N 17.) *What not.]* But the inquisition must be taken within the county where the land lies. *Duke, 119, 120, 148, 149.*

Or, where the commissioners have authority. *Duke, 148.*

If the land lies in several counties, there must be inquisitions taken in all. *Ibid.*

Or, if the commission goes only to one, an inquisition may be taken afterwards upon another commission in the other. *Ibid.*

So, the commissioners cannot inquire by the oath of the party himself. *Duke, 150.*

Or,

Or, by illegal evidence; as, a deed cancelled, a record reversed, &c. *Duke, 150.*

So, an inquisition must find the gift, and also the abuse, otherwise it will be imperfect. *Duke, 149.*

It must find the general use truly, otherwise it is void; as, if it finds a gift for poor scholars, where it was for soldiers. *Ibid.*

Or, a gift for a highway, which was for poor virgins. *Ibid.*

(N 18.) *As to misemployment.*] So, by the *st. 43 El. 4.* commissioners may inquire of all abuses, breaches of trust, negligences, misemployments, not employing, concealing defrauding, misconverting, or misgoverning of any lands, goods, &c. given to any charitable uses before rehearsed.

And therefore, every misemployment, or misgovernment, and every neglect of employing, or the defrauding of the charity, is inquirable. *Duke, 115.*

If the trustee leases at an undervalue. *R. 2 Ver. 414, 415.*

So, if a man to whom land is devised for a charitable use by *covin* with the heir waives the devise, it is a fraud inquirable. *Duke, 150.*

So, if the heir refuses a legacy for discharging a mortgage that the land may be settled. *Ibid.*

If a husband by *covin* disagrees to a gift to his wife. *Ibid.*

If the feoffee to a charitable use aliens in *mortmain*, and afterwards purchases the land of the king. *Ibid.*

If the grantee of a rent for a charitable use by *covin* with the *tenant* grants the rent to him. *Duke, 153.*

(N 19.) *What cases are exempt from the inquiry.*] But, by the *st. 43 El. 4.* it is provided, that the said act extend not to lands, goods, &c. given to a college, hall, or house of learning, in the universities of Oxford or Cambridge, the colleges of *Eaton, Westminster, or Winchester*, or any cathedral or collegiate church.

So, if a gift be to the university itself, it will be exempt. *Duke, 171.*

So, by a proviso in the same statute, it does not extend to lands, &c. given to or in any city or town corporate, where a special governor is appointed to direct the disposal.

Nor, to any college, hospital, or free-school, which has a special visitor, governors, or overseers appointed by the founder.

And this proviso extends to the company of mercers, grocers, &c. in London. *Duke, 171.*

To a gift made to a corporation, to be employed in another corporation. *Duke, 172.*

Or, to be employed by the mayor in the same corporation. *Ibid.*

To a gift to an hospital in reputation, which has a governor; as, to the poor knights of *Windfor*; for the dean and canons of *Windfor* are their governors appointed by the founder. *Ibid.*

But the proviso does not extend to a gift to a corporation not in *esse* at the time of the act. *Duke, 171.*

Or, to a gift made since the act to a corporation which was then in *esse*. *Ibid.*

Nor, to goods given to a corporation; for the statute speaks only of lands and tenements. *Ibid.*

Nor,

(N 20.)
The com
all person
(N 21.)
be made
was taken
(N 22.)

Nor, to land given to a member of a corporation, &c. and not given to the corporation. *Duke, 172.*

Or, a gift to a corporation, which is not to be employed there, or in another corporation. *Ibid.*

[If lands are given to trustees, governors of a college, hospital, or school, for the use of it, and a special visitor is appointed, or one by operation of law, the commission shall not interpose; but, if the lands are given to such governors on a collateral charity, (as to mend roads,) it may. *Attorney-General v. Harrow School, T. 1754, 2 Vesey, 551.*]

Or, when the governors, &c. of the corporation have no power to enforce the employment to the charity; as, if the gift is to a college to pay 20*l.* to the parson of *D.* to be distributed amongst the poor of *D.*; for the visitor, &c. cannot compel the parson to make distribution. *Duke, 172.*

So, if the governor, &c. has no power to enforce the employment of the whole, but only part of the charity, it will be exempt for the whole. *Duke, 172.*

So, by a proviso in the same statute, no person, who purchased for valuable consideration without fraud, and without notice of the charitable use, shall be impeached, &c.

And therefore, the commissioners have no authority to make a decree against a purchaser for valuable consideration without fraud or notice; as, for money paid, plate given, &c. *Duke, 177.*

Land, rent, lease, ward, or title to land conveyed, &c. *Ibid.*

So, if a debt, &c. is released, &c.; for it is a valuable consideration. *Ibid.*

If rent, or a fine, is paid upon a lease made. *Ibid.*

But it is no valuable consideration, if a man gives for the purchase things of pleasure, tho' valuable; as, jewels, &c. *Ibid.*

A mere possibility in land, &c. *Ibid.*

Money only to part of the value. *Ibid.*

So, if the consideration is mixt; as, for money and affection. *Ibid.*

In consideration of money and marriage. *Ibid.*

So, if the consideration is executory. *Duke, 178.*

Or, for payment of debts of the vendor, or portions for his daughters. *Duke, 177, 178.*

So, a lease to the full rent is not a deed upon a valuable consideration, *Duke, 178.*

And the commissioners are not to be satisfied by the mention of the consideration in the deed, &c. *Ibid.*

So, if a gift be to the poor, &c. generally, without mention of any particular place, the commissioners have no authority therein, but it must settled in Chancery. *Per Finch, 2 Lev. 168.*

(N 20.) *Decree by the commissioners. Who shall be summoned by them.* The commissioners, before a decree made by them, ought to summon all persons concerned in interest. *Duke, 117. 151.*

(N 21.) *By what commissioners it shall be made.* The decree must be made by such commissioners as were present when the inquisition was taken. *Duke, 154. Cont. Duke, 68. 118.*

(N 22.) *How the decree shall be made.* The decree must direct the employment

employment of the goods or lands according to the intent of the donor; and therefore, if some of the lands are given for the repair of the church, others for the relief of the poor, &c. the profits cannot be employed promiscuously; but the rents of each estate shall be applied to the particular use for which it was given. *R. 1 Ver. 43. Per Mo. Duke, 158. Vide Chancery, (2 N 4.)*

If the gift was to persons of such sex, nation, trade, quality, or profession, the decree must be conformable to it. *Per Mo. Duke, 158.*

If the gift fixes the number of persons who are to take, the decree must not alter it. *Per Mo. Duke, 157.*

If it appropriates it to a parish, prison, school, &c. the decree cannot vary it. *Per Mo. Duke, 158.*

Or, to a particular purpose; as, for diet, apparel, house of correction, ease of fifteenths, &c. the decree cannot direct it for other purposes. *Per Mo. Duke, 158. 160.*

Tho' the land be increased to a greater value. *R. 11 Car. Duke, 68.*

(N 23.) *Who are bound by the decree.*] All shall be bound by the commissioners' decree whom the donor by his act or conveyance could bind; as, he who claims title under the donor by descent *Per Mo. Duke, 160. R. Ch. Ca. 267.*

But persons who claim *paramount* the gift or devise to the charity, are not bound by the decree. *R. Ch. Ca. 267.*

(N 24.) *It must be certified to Chancery.*] Every decree by commissioners must be certified to the Chancery. *Per Mo. Duke, 164.*

(N 25.) *Exceptions to the decree.*] The party grieved by the decree may take exceptions to it before the chancellor. *1 Ver. 42.*

So, after exceptions by a lessee over-ruled, his lessor may take exceptions to it. *2 Ver. 507.*

So, after a decree twice confirmed, upon a rehearing an issue may be directed to try the fact. *2 Ver. 507.*

(N 26.) *Chancery may confirm and make execution.*] If a decree by commissioners be certified, and there is no exception by the party aggrieved within a reasonable time, he shall be concluded thereby without more. *Ch. Ca. 194.*

If exception be taken and disallowed, the decree shall be confirmed.

After confirmation the chancellor may award execution in what manner he pleases. *Per Mo. Duke, 166.*

The most usual course is, to make a writ of execution upon the statute, and afterwards an attachment, and then he shall be imprisoned till performance. *Ibid.*

Or, he may award an *elegit* or *fieri facias*. *Ibid.*

So, if the decree transfers the property of the land or goods to another, he to whom decreed, may take or enter without a writ of execution. *Per Mo. Duke, 164.*

If it decrees a lease to be void, he in reversion may enter. *Ibid.*

If it decrees a deed, &c. to be delivered, it may be delivered without a writ of execution. *Ibid.*

If a rent to be discharged, it may be executed by way of retainer.
Per Mo. Duke, 164.

[N 27.] Or enlarge or annul it.] But, if the decree appears to be out of the power of the commissioners, contrary to the statute or common law, or ecclesiastical law, or intent of the donor, the chancellor may annul it. *Per Mo. Duke, 164. Eq. Ca. 65.*

So, upon a suggestion, without bill it may be annulled if made without authority; as, if the precept was only by three commissioners, or there was no inquisition. *Per Mo. Duke, 163, 164.*

So, if the exception taken be allowed, it shall be annulled.

But, if the decree is only voidable, it shall not be annulled without bill. *Per Mo. Duke, 163.*

As, if the party was not summoned, or a legal challenge disallowed, &c. *Ibid.*

So, if a suggestion is made, it must be proved immediately, otherwise execution shall not be stayed. *Per Mo. Duke, 165.*

So, execution shall not be stayed, if the matter suggested is only irregularity; as, disproportion in allowances. *Per Mo. Duke, 163.*

So, it shall not be annulled for matter arising after the decree; as, if assets fail after a decree against an executor or administrator; for it was his default it was not performed before. *R. Mo. 823.*

So, if the commissioners by decree direct payment of 85 *l.*, the chancellor may increase it to 170 *l.* *R. 5 Car. Duke, 32.*

If commissioners are designedly vexatious, *Chancery* may punish them; but otherwise they pay no costs. *Eq. Ca. 65.*

The decree by *Chancery* shall be final, and no appeal lies to parliament. 2 *Ver. 118.*

Nor, shall there be a rehearing upon it. *Semb. 2 Ver. 118.*

But *Chancery*, after a decree which takes away a trust from a corporation for not paying 4000 *l.* to a charity, may, upon payment, revest the trust in them, tho' the former decree was signed, inrolled, exemplified, and the conveyance to other trustees executed. *Dub. Eq. Ca. 7.*

Vide more concerning *Uses* in *Chancery*, (2 N 1, &c.)—*Remitter*, (C 6.)

U S U R P A T I O N.

— of a Church.

Vide *Esglise*, (H. 14, 15.)

— by the Pope.

Vide *Popery*, (A 1, &c.—B 1, &c.)

U S U R Y.

(A) Usury, what shall be.

USURY was an offence by the common law, and upon conviction the usurer forfeited his goods to the king, and his lands to the lord of the fee. 2 *Rol.* 800. 3 *Inst.* 151, 152.

If it was such usury as the Jews took, viz. 40*l.* *per centum per annum.*

By *§. 37 H. 8. 9.* (by which all former statutes against usury are repealed) no person by way of corrupt bargain, loan, &c. or other mean, shall take for forbearance of 100*l.* or other thing due for wares, &c. for one whole year above 10*l.* *per centum*, and so *pro rata*, &c.

And no person, who takes a mortgage of any lands, &c. on condition, for payment of money, &c. shall have or take in lucre, or out of the profits of such lands, above 10*l.* *per cent.* for a year, and so after that rate, &c.

By the *§. 13 El. 8.* (by which 5 & 6 *Edw. 20.* for repeal of the *§. 37 H. 8. 9.* was repealed, and the same *§. 37 H. 8. 9.* was revived) all bonds, contracts, and assurances for payment of money upon usury contrary to the said *§. 37 H. 8. 9.* shall be void.

And the said statute now revived shall be construed most strongly for the suppressing of usury.

By the *§. 21 J. 17.* no person shall take above 8*l.* *per cent.* and so *pro rata*, &c.

And by the *§. 12 Car. 2. 13.* no person upon any contract shall take directly or indirectly for loan of any money or wares, &c. above the value of 6*l.* for forbearance of 100*l.* for a year, and so after that rate, &c.; nor, by the *§. 12 Ann. 16.* above the value of 5*l.*, &c.

And by the *§. 21 J. 17. & 12 Car. 2. 13.* all bonds, contracts, and assurances, whereby shall be taken above such rate, shall be void. So, by the *§. 12 Ann. 16.*

And therefore, where a man gives a bond or other assurance for payment of an interest for money above the rate allowed by the statute, it will be void.

Or, if the loan was of goods, or any other thing, and not money, *Mo. 398.*

So, if upon an usurious contract, he gives a mortgage for security of the principal only, and takes a bond for the interest, the mortgage as well as the bond shall be void. *R. 2 Cro. 508.*

So, if the allowance beyond the rate of the statute be by a mean, and indirectly; as, if a man contracts to have 6*l.* *per cent.* and deducts the whole at first before the creditor has the money. *D. 2 Cro. 26. Mo. 644.*

[If a country banker, discounting a bill, takes interest for the whole time it has to run, and instead of paying money for the bill gives notes payable in London three days after sight, such country banker is guilty of usury. *Matthews v. Griffiths, B. R. M. 34 Geo. 3. Peake's Ni. Pri. 200. Infra (B).*]

[A. indorses a note for 200*l.*, B. takes the note on advancing 197*l.* three months before due, and at the end of the three months takes another note for 200*l.* on advancing 3*l.* for other three months; this is

is usury within *st. 12 Ann. c. 16. Massa v. Dauling, M. 19 G. 2. Str. 1243.*

So, if it be upon a contingency whether he shall have above the allowance, or no interest, when there is not any hazard of the principal; as, an agreement for payment of 100*l.* for wares within a month, or otherwise 120*l.* at the end of a year. *R. Mo. 397. 5 Co. 70. a. 2 Cro. 508.*

[If *A.* upon a loan of money, stipulate to have *half the profits* on a resale of goods to be purchased by the borrower, which profits exceed 5*l. per cent.* and *A.*'s principal is not risked, *Qu.* whether this contract be not usurious? *Cowp. 793.*]

Or, for payment of the principal, and 10*l. per centum* so long as *A.* shall live. *R. Mo. 398. R. 2 Cro. 508.*

Or, for payment of 20*l.* and to pay 10*l.* for interest at the end of the year, if *A.* be then alive. *R. Cro. El. 642. Mo. 398. 5 Co. 69. b.*

Or, to pay 300*l.* for 100*l.* if any of his children be alive two or three years after, when he has many children then alive. *Cro. El. 741. R. 2 Cro. 253. 507.*

So, tho' there be a small risk of the principal; as, if the agreement be for 100*l.* to pay 400*l.* at the end of 10 years, if any of his five daughters are then living. *Dub. Cro. El. 741.*

Or, upon a loan of 300*l.* to pay 22*l.* in three months, and 300*l.* with 6*d. per pound premium* within six months, if *A.* is then living, who was then of the age of 38 years and in health. *R. Carth. 68. R. 2 Rol. 47.*

Or, to pay 3*s. per month* for 7*l.* after one month, if it be not then paid. *Semb. Jon. 410.*

So, where words are colourably added to avoid the statute, which may be averted; as, if the agreement be to pay for 100*l.* 20*l. per ann.* from Michaelmas next, if it be not repaid before Michaelmas, where it was agreed that it should not be repaid before. *5 Co. 69. b.*

[For, if the substance of a contract be a borrowing and lending, a slight colourable contingency only, will not take it out of the statute. *Cowp. 770.*]

[There is no contrivance whatever by which a man may cover usury, by *Ld. Mansfield, Ch. J. Jesters v. Brooke, B. R. E. 18 Geo. 3. Cowp. 796.*]

Or, if for 100*l.* he grants an annuity, with an intent to elude the statute. *Per Ch. Bar. Cro. El. 28. R. 2 Lev. 8.*

If upon an usurious contract several securities are given, one for interest, and another for principal. *2 Cro. 508.*

If a *feme-covert* acts as a pawnbroker, and lends money upon an usurious contract, and takes a bond for it to her husband, the bond shall be avoided by pleading the statute, tho' the husband is not chargeable for the usury *criminaliter.* *R. Skin. 348.*

[If the borrower of money give a bond for the principal and interest at five *per cent.* and covenant at the same time also to pay to the lender a certain portion of the profits of a trade carried on by him in partnership with another person, it is an usurious contract, and the obligee cannot recover on the bond. *Morse v. Wilson, B. R. T. 31 Geo. 3. 4 T. R. 353.*]

[If there be an agreement to pay legal interest, and a premium be paid down, over and above the interest, the agreement is usurious and void. *Doug. 235.*]

[But the penalty under the statute of *Ann.* is not immediately incurred, if the premium itself do not exceed legal interest, nor until more than legal interest be *actually* received. *Ibid.*]

[And therefore, an action may be brought for the penalty, tho' more than a year has elapsed since the payment of the premium, if it be not a year since what has been paid exceeded legal interest. *Ibid.*]

[If, on a negociation, for a loan of money, the lender say, he cannot advance the money, but will furnish goods which the other takes and sells, if the security given be for a sum of money made payable at a future day, greatly exceeding the value of the goods and *5 l. per cent. interest*, this is an usurious loan, and the security and contract are both void. *Doug. 736.*]

[By *yl. 14 G. 3. c. 79.* the lawful interest in *Ireland*, or the colonies, may be taken for money lent in *England* on mortgages of land or goods in these countries, and the deeds executed in *England* are good. The deeds must be registered according to the laws of these countries.]

[But the interest is not to exceed *6 l. per cent. s. 2.*]

[This statute relates solely to securities on land in *Ireland* and the colonies; and therefore, where *A.* contracted with *B.* for the sale of an estate in the *West Indies*, and it was agreed that part of the purchase-money should remain secured by the bond of *B.* and *C.*, and that bond was afterwards cancelled, and another executed in *England* by *B.* and *D.*, reserving *6 l. per cent. interest*, in the same manner as the former one, such contract was held usurious. *3 Term Rep. 425.*]

(B) What not.

BUT a loan of 100*l.* upon a contract to pay the interest by half-yearly payments, *viz.* a moiety at *Michaelmas* and the other moiety at *Lady-day*, is not usurious, tho' the advantage of the interest before the end of the year makes it above the rate allowed by the statute; for, it is according to such rate, and this is *pro rata* of the statute. *R. per three J. two cont. 2 Cro. 26. Yel. 30. Mo. 644. R. Cro. Car. 283. Jen. 396.*

[Where it is in the power of the borrower of money to pay the principal within a limited time, without interest; on non-payment, the reservation of a larger sum than the statute allows is no usury. *Corup. 115.*]

[Therefore, if a tradesman sell goods at three months' credit, and stipulate, in case the money be unpaid, that the vendee shall allow him a halfpenny an ounce *per month* till he discharge the debt; this allowance, tho' above the legal rate of interest, yet being the *usage* in that trade, and the contract being a *bona fide* sale, is not usurious. *Ibid. 112.*]

[The loan of money produced by the sale of stock, on an agreement that the borrower shall replace his stock on a certain day, or *re-pay the money* on a subsequent day, with such interest in the meantime as the stock itself would have produced, is not usurious, tho' the interest

interest exceed 5*l.* per cent., unless the transaction be colourable, and a mere device to obtain more than legal interest. 3 *Term Rep.* 531.]

[But if the contract were legal at the time it was entred into, no subsequent event can make it usurious, by *Buller J.* *Ibid.* 539.]

So, if the contract be for 100*l.* and the interest per ann. and he accepts the whole interest within the year. *R.* 1 *Bul.* 17. *Semb. cont.* where the whole was deducted at the time of the loan. *Mo.* 644. 2 *Cro.* 26.

So, if by mistake the words require payment before the time agreed, it will be no usurious contract, tho' the interest exceed the statute, if payable at the time limited; as, if a bond 1 *April* be to pay 105*l.* on 21 *April* next, where the agreement was for a year next. *R.* 2 *Cro.* 677. *R.* 2 *Vent.* 83.

If, in a mortgage, the clause for the mortgagor to take the profits till default be omitted. 2 *Mod.* 307.

Tho' the plaintiff had notice of the mistake before action brought. 2 *Vent.* 83.

So, if the bond was intended to be payable at the end of the year, and by mistake it is made payable at six months. *R.* *Cro. Car.* 501. *Jon.* 396.

So, if there be a corrupt agreement; to which the plaintiff was not privy, it shall be no prejudice to him; as, if *A.* be indebted to *B.* in 100*l.*, for which *A.* and *C.* give a bond to *B.*, and it is agreed between *A.* and *C.* that *A.* shall give 30*l.* to *C.* for forbearance of 100*l.* which *A.* owes to *C.*, and shall be bound to *C.* for this 30*l.*, and *A.* and *C.* are bound to *B.* for the 100*l.*, the bond to *B.* being for a just debt, tho' made upon an usurious contract to which *B.* was not privy, it shall not be avoided. *R.* per three *J.* 2 *Cro.* 33. *Yel.* 47. *Mo.* 752. *Acc. per Holt, T.* 8 *W.* 3. *Inter Hufsey and Jacob.* *Com.* 4. See *Str.* 1155. *Doug.* 736.

[A bill of exchange given on an usurious consideration is void even in the hands of an innocent indorsee for a valuable consideration, without notice of the usury. *Lowe v. Waller, B. R. T.* 21 *Geo.* 3. *Doug.* 736.]

And it is sufficient that *B.* replies that he was not privy, without traversing the corrupt agreement. *R.* 2 *Cro.* 33.

[A memorandum indorsed on a bond which was conditioned for the payment of 100*l.* by quarterly payments of 5*l.* each and interest at 5*l.* per cent. "that at the end of each year the year's interest due was to be added to the principal, and then the 20*l.* received in the course of the year was to be deducted, and the balance to remain as principal, and so continue yearly till both principal and interest were fully paid," was not usurious. *Le Grange v. Hamilton, B. R. E.* 32 *Geo.* 3. 4 *T. R.* 613. 2 *H. Bl.* 144.]

[The offence of usury is not complete until the lender has actually received the excess of interest in money, or money's worth. Therefore if a promissory note be given for repayment of a sum lent with usurious interest, and the note when due not paid, but another note substituted for it, the offence of usury is not thereby committed, nor is the penalty incurred till the latter note be paid. *Maddock v. Hammett, B. R. E.* 37 *Geo.* 3. 7 *T. R.* 184.]

[*A.* being a banker in the country discounts bills at four months for *B.*, and takes the whole interest for the time they have to run;

B., on being asked how he will have the money, directs part to be carried to his account, part to be paid in cash, and part by bills on *London*, some at three, some at seven, and some at thirty days' sight; and holden not to be an usurious transaction, so as to induce the court to grant a new trial, since the surplus of interest taken by *A.* might be referable to the expences of remittance. *Hamet v. Yea*, *C. P. M.* 38 *Geo.* 3. 1 *Bos. & Pull. Rep.* 144. *Supra* (A).]

So, if, after a bond upon an usurious contract, *A.* gives a counterbond to indemnify the obligor from such bond, and he is thereby damnified, the counterbond is in force, tho' the first bond was usurious. *R. Cro. El.* 642. *Noy*, 73. *R. Cro. El.* 588. for the surety perhaps was not privy to the usury.

So, if, after a contract made *bonâ fide*, there is a subsequent agreement for a rate above the statute for further forbearance, the last contract only will be void, and not the first. *R. Cro. El.* 20. *R. 1 Sand.* 294. *Acc.* 2 *Mod.* 307.

So, if a bond or recognizance be forfeited, and it is afterwards agreed to accept more interest than the statute allows, and to make another defeasance, it is no usury; for the forfeiture of the recognizance, &c. is to be considered. *R. Noy*, 2.

So, if there be a hazard of the principal, it will not be usury, tho' the interest upon a contingency may exceed 6*l. per cent.*; as, if a wager be to give 40*l.* for 20*l.* paid, if *A.* is alive, at the year's end. *Cro. El.* 643.

So, if there be an agreement for 100*l.* to pay 80*l.* to each daughter (and he has then five) who shall be living at the end of ten years. *R. Cro. El.* 741.

[Interest, exchange, and other incidental expences on a protested bill of exchange beyond 5*l. per cent.*, if the charges are reasonable, and warranted by usage, are not unlawful, provided they are not made a colour for usury. *Auriol v. Thomas*, *B. R. T.* 27 *Geo.* 3. 2 *T. R.* 52.]

[So, a country banker is entitled to take not only 5*l. per cent.* legal interest, but also a reasonable sum for remitting and other necessary incidental expences attending the negotiating bills, provided the charges are fair and reasonable, and not a colour for usury. *Ibid.*]

[So, on a bond given in the *East Indies*, where both parties then resided, and where the allowed interest was 9*l. per cent.*, the court of *B. R.* in *England* (where the bond was sued) held that the plaintiff was in justice entitled to recover the sum really lent, together with *Indian* interest till the signing of the judgment, but with only the legal interest of this country, from the time of the liquidation of the debt by the judgment. *Bodily v. Bellamy*, *B. R. M.* 1-*Geo.* 3. 2 *Burr.* 1094. 1 *Bl.* 267. *S. C.*]

[So, if for two guineas received, a man promises to pay twenty on his wife's death, who is seventy years of age. *Lamego v. Gould*, *H.* 32 *G.* 2. 2 *B. M.* 715]

Or, for 50*l.* to pay 60*l.* at the return of a ship, (which may return in five months,) or if it never returns, nothing. *R.* 2 *Cro.* 209. 508. *Acc. Sho.* 8.

Or, at the return of a ship, goods, or owner; for it is a bottomry contract. *R.* 1 *Lev.* 54. *R. Hard.* 518. *Acc.* 2 *Roll.* 48.

Or, for 100*l.* to pay an annuity of 50*l.* a-year for life, tho' there

is a mortgage for repayment of the 100 *l.* if the annuity is not paid; for it is a purchase, and, upon the death of *cestui que vie*, the money is lost. *R. 2 Cro. 252. 1 Bul. 36. R. Cro. El. 27. Per Twissd. 1 Sid. 182.*

[If 2000 *l.* is lent, on condition to pay the principal and 200 *l.* in a year, or 250 *l.* *per annum* for the life of the borrower, it is not an usurious contract. *Wortley v. Pitt, M. 1748, 1 Vesey, 164.*]

[So, if *A.* for 120 *l.* grants an annuity of 20 *l.* out of a living, by deed, with promise for redemption in five years, and gives bond for performance, this is not usury, tho' the words *borrow* and *lend* are used. *Murray v. Harding, H. 13 G. 3. 3 Wils. 390. 2 Bl. Rep. 859.*]

Or, for 100 *l.* to pay 20 *l.* a-year from *Michaelmas* next, if the 100 *l.* is not repaid before *Michaelmas*; for he may repay it before *Michaelmas* without interest, if this was the true intent. *5 Co. 69. b.*

Or, if for 300 *l.* a lease is made to *B.* at 35 *l.* *per ann.* of a house of which the rent was only 5 *l.* with a covenant to convey to him, if *B.* repaid the 300 *l.* in four years; for it was at the election of *B.* to repay or not. *R. 2 Lev. 7.*

[So, if *A.* lends *B.* 100 *l.* for four years, without interest, in consideration that *B.* shall provide meat and drink for *A.*'s daughter *C.* who is to be partner with *B.*'s wife, have half the profits, and bear half the loss, and to lodge *A.* for 10 *l.* *per ann.* it is not usurious, tho' the board of *C.* and lodging of *A.* might be worth 30 *l.* *per annum.* *Morisset v. King, M. 33 G. 2. 2 B. M. 891.*]

[By *stat. 17 G. 3. c. 26.* a memorial of all deeds, &c. for grant of annuity for life, shall in twenty days be inrolled in *Chancery*, or shall be void; so, of judgment on warrants of attorney for that purpose. Deeds must contain the consideration.]

(C) Punishment of Usury.

[EQUITY will assist the borrower on an usurious contract, to retain all but the legal interest, or to recover back what has been paid on such a contract, above the principal and legal interest. *Doug. 697.*]

By the *stat. 13 El. 8. 21 Jac. 17. and 12 Car. 2. 13.* all bonds, contracts, &c. upon usury are void. *Vide ante (A).*

How the statute shall be pleaded to such a bond, &c. *vide in Pleader, (2 W 23.)*

By the *stat. 13 El. 8.* persons taking usury above the rate mentioned in that statute shall forfeit such interest, &c.

By the *stat. 37 H. 8. 9. and 12 Car. 2. 13.* if any, by way of corrupt bargain, &c. take more than is allowed by statute for forbearance of money or other thing, he shall forfeit treble the value of the monies, wares, &c. lent, &c. a moiety to the king, a moiety to him who will sue for the same.

And tho' the first contract was not usurious, if a man takes afterwards above the allowance of the statute for the loan of money, &c. an information lies upon such statute. *1 Sand. 295. R. 1 Vent. 38. Ray. 196.*

And if there be an usurious contract to pay 20 *l.* for forbearance of 100 *l.* an information lies, tho' he does not take above the legal interest. *R. 1 Vent. 38. Ray. 126. Per Twissd. 1 Mod. 69.*

So, tho' he takes but a penny of the interest upon such agreement.
Cro. El. 20.

So, if a feoffment, lease, &c. be made upon an usurious contract, it will be void, as well as a bond. *Jon.* 303.

[But an indictment for usury lies not for a corrupt agreement, without loan, or taking in pursuance of it. *Rex v. Upton*, *M.* 2 G. 2, *Str.* 816.]

So, if an usurious contract be for 20*l.* for forbearance of 100*l.*, and he takes no part of the 20*l.*, an information does not lie against him. *R. Cro. El.* 20.

[When the usurious contract, the lending, the forbearance, or interest concur, then the offence is committed, and the action must be brought on 12th *Ann.* within a year from that day, nor does part of the penalty being to the king avail. *Lloyd v. Williams*, *M.* 12 G. 3, 3 *Willf.* 250. 2 *Bl. Rep.* 792. *S. C.*]

[The court will permit prosecutor to compound. *Barnes*, 118.]

[The usurious contract must be proved as laid. *Carlisle v. Terars*, *B. R. M.* 18 Geo. 3. *Cowp.* 671.]

[Before a party can entitle himself to relief, by civil action, from an usurious contract, he must tender all the money really advanced; therefore, where goods are pawned to a broker for a certain sum, and usurious interest agreed to be paid thereon, the pawner of the goods cannot maintain an action of trover for them, in order to get rid of the usurious contract, without first tending the money which had been actually advanced, with legal interest. 1 *T. R.* 153.]

[A *bonâ fide* debt is not destroyed by being mingled with an usurious contract relating to it. *Gray v. Fowler*, *C. P. T.* 30 Geo. 3, 1 *H. Bl.* 462.]

[The court will stay proceedings on a *scire facias*, in a judgment entered up on a warrant of attorney, to wait the event of an issue directed to try the usury. *Cook v. Jones*, *B. R. H.* 18 Geo. 3. *Cowp.* 727.]

(D) Punishment of Brokage.

SO, by the *st.* 12 *Car.* 2. 13. scrivener, broker, solicitor, &c. who shall directly or indirectly take any money or other reward, above the value of 5*s.* for procuring the loan or forbearance of 100*l.* for a year, and so *pro rata*, &c. or above 12*d.* for making or renewing a bond or bill for such loan, or for a counterbond concerning the same, shall forfeit 20*l.* for every offence, and be imprisoned for half a year; a moiety to the king, a moiety to him who will sue for the same.

But an agreement by *A.* to give *B.* 200*l.* if he procures 5000*l.* to be paid in his name upon an aid granted by parliament, does not appear to be brokage; for the borrower pays nothing, and the lender receives nothing. *R. Skin.* 322.

[See also *stat.* 17 Geo. 3. c. 26. s. 17.]

Vide more concerning *Usury*, in *Pleader*, (2 G 7.)

UTLAGARY.

(A) Outlawry.

A MAN outlawed is, when by judgment of law a man, by his own default, is ousted of the law. *Co. L. 122. b. 128. b.*

For every man at his age of twelve years ought to be sworn to the law in a tourn or leet, and by his outlawry he is *positus extra legem*. *Co. L. 122. b.*

A woman who does not swear to the law, by judgment of outlawry, is not said to be outlawed, but *waiviata*. *Co. L. 122. b.*

And therefore, if a woman is said to be *utlagata*, it will be error. *R. 2 Rol. 804. l. 5.*

(B) In what Cases it lies.

A Man shall be outlawed for his default if he will not stand to the law; and therefore, upon an indictment for treason or felony, if the defendant does not appear upon the second *capias*, he shall be outlawed. *Vide Indictment (I).*

So, in an appeal. *St. P. C. 60. a. 67. Vide Appeal, (G 5.)*

And if he does not render himself within a year, he shall be executed without other judgment or trial. *3 Mod. 42. 72.*

[It lies on an information. *Rex v. Wilkes, T. 8 Geo. 3. 4 B. M. 2527.*]

[And in an information for any offence, in its nature against the laws of society, and that disturbs the good order which keeps a state in peace, (the true meaning of *contra pacem*,) tho' not with actual force. *Ibid.*]

So, upon an indictment for a misdemeanor or information, he shall be outlawed, but he shall not be fined thereon without other conviction for the offence. *Vide Information, (D 1.)*

So, if a peer does not appear upon an indictment for treason or felony, he shall be outlawed. *3 Inst. 31.*

But where a *capias* does not lie in *process*, the defendant cannot be outlawed before or after judgment; as, upon a writ of privilege by an attorney or another. *R. 1 Leo. 329.*

[It lies not for less than 10*l.* *Semb. Sed Qu. Barnes, 320.*]

[If defendant avoids arrest, tho' he appears publicly, he may be outlawed. *Barnes, 320.*]

[On total absconding, no endeavours to arrest are necessary. *Barnes, 322.*]

How to proceed to outlawry, *vide in Pleader, (2 W 4, &c.)*

(C) How an Outlawry shall be avoided.

(C 1.) For what Causes.

OUTLAWRY shall be avoided if the person outlawed, at the time outlawry pronounced, was within the age of discretion; as, if he was an infant under fourteen years. *2 Rol. 805. l. 10. R. Dy. 239. a. Bend. pl. 205.*

So, if a woman, at the time she is waived, was *court baron*. *2 Rol. 806. l. 45.*

So, if a man, at the time of his outlawry, was in prison, it will be error. *Lit. f.* 437. 2 *Rol.* 803. l. 35.

Tho' the outlawry was for felony, or in a personal action. 2 *Rol.* 803. l. 35.

But imprisonment is no cause to avoid an outlawry, if it be by *covin* or consent. *Co. L.* 259. b.

If a man in prison, brought to the bar, will not appear. *R.* 2 *Rol.* 804. l. 50.

So, if a man, at the time of his outlawry, was out of the realm, it will be error. *Skin.* 6. [2 *Str.* 1178. 1 *Willf.* 3.]

If a man was in the king's service with a captain, &c. in war. 2 *Rol.* 803. l. 42. 804. l. 15.

Or, about the king's business, by his command under letters patent. 2 *Rol.* 803. l. 40. 804. l. 15.

So, if he was out of the realm for his own private business, or for his pleasure, and not upon the business of the king, or the realm. 2 *Rol.* 804. l. 20. 2 *Rol.* 11, 12.

Tho' he be outlawed for felony, or in a personal action. 2 *Rol.* 804. l. 35. *Skin.* 16.

So, if he goes out of the kingdom upon the business of the king or the realm, after *exigent* pronounced, he shall avoid the outlawry afterwards. *R.* 2 *Rol.* 804. l. 40.

But if a man goes voluntarily out of the kingdom after *exigent* for felony pronounced, he shall not avoid the outlawry afterwards pronounced. *R.* 2 *Rol.* 804. l. 30.

If it appears upon the record, or confession of the king's attorney. *Semb.* 2 *Rol.* 12.

So, outlawry for treason cannot be avoided, because the party was out of the realm; for by the *st.* 26 *H.* 8. 13. and 5 & 6 *Ed.* 6. 11. process and outlawry against any for treason, who is out of the realm, shall be as good as if then resident in the realm. 3 *Inst.* 32.

So, an outlawry may be avoided, if the person outlawed be misnamed, or his addition mistaken; as, if he be named *knigh*t, when he was a *baronet*. *R. Comb.* 184.

[If the day and year of the King be inserted in the 1st, 2d, 3d, and 5th exaction, but omitted in the 4th, it is erroneous, and shall not be supplied by intendment. 2 *Hale's P. C.* 203.]

[The sheriff must state, in his return to the writ of *exigent*, the day and year of each exaction. Therefore, where the sheriff stated that on such a day in the 30th year of the reign he exacted the defendant a third time; that afterwards, on such a day, (omitting the year,) he exacted him a fourth time; and that afterwards on such a day in the 30th year *aforsaid* he exacted him a fifth time, it was holden insufficient, and a good ground for reversing the outlawry. *Rex v. Almon*, *E.* 33 *Geo.* 3. 5 *T. R.* 202. 2 *Rol. Abr.* 202. pl. 8.]

[In a record of outlawry it appeared by the writ of proclamation and return to it that the prisoners were required to render themselves to the sheriff, so that he might have their bodies before the justices, &c. at the return of the writ, and it was holden good. *Rex v. Yandell*, *H.* 32 *Geo.* 3. 4 *T. R.* 521.]

[If it appear on the record that the writ of proclamation was delivered to the sheriff, three months before the return of it, it is sufficient, tho' it be not so expressly alleged. *Ibid.*]

[The

[The writ of proclamation required the sheriff to proclaim the parties in open court in the sheriff's county, (not saying county court,) and it was holden good. *Rex v. Yandell*, H. 32 Geo. 3. 4 T. R. 521.]

[The sheriff need not allege in his return to the writ of proclamation that "the persons proclaimed did not appear, and render themselves," tho' he must in his return to the exigent. *Ibid.*]

[The names of the coroners need not be subscribed to the judgment of outlawry; it is sufficient, if it appear on the record that the judgment of outlawry was given by them. *Ibid.*]

[It need not appear on a record of outlawry that the capias and exigent were sealed by the justices of oyer and terminer, &c. *Ibid.*]

[If it be stated that the justices of our Lord the King were assigned by letters patent under his seal of Great-Britain, it will be presumed to be the great-seal. *Ibid.*]

[It need not be stated in express terms on a record of a judgment of outlawry that a writ of capias issued against the defendant; it is sufficient, if it appear "that the sheriff was commanded to take the defendant, &c. *Rex v. Perry*, H. 36 Geo. 3. 6 T. R. 573.]

[Neither is it necessary in stating every writ to repeat the day and year when each was issued; it will suffice if it appear by referring to the preceding parts of the record; as if, after stating that the capias was returned on such a day, it proceed thus: *Whereupon* the exigent was a warded, *whereupon* referring to the day when the capias was returned. *Ibid.* *Vide supra* Pleader, (2 W 5.)]

If he be outlawed by judgment of the coroners, without naming them, except in London, where the mayor is coroner, and therefore *ideo utlagat. est* is sufficient without more. R. 2 Cro. 528. 531.

[So, an outlawry for felony shall be reversed, if it appear on the writ of proclamation, and the return to it, that the person indicted was outlawed after a day had been given him in court, and before such day arrived. 3 Term Rep. 499.]

So, by the *st.* 5 & 6 Ed. 6. 11. if any outlawed for high treason, within one year after yield himself to the chief justice, and offer to traverse the indictment on which he was outlawed, he shall be admitted so to do, and, being acquitted of the indictment, shall be discharged of the outlawry.

So, by consent of the attorney-general, he may reverse the outlawry for error. 3 Mod. 42.

And shall assign error at the bar, in proper person *ore tenus*, and then the court assigns counsel to argue it. *Skin.* 16.

But the *st.* 6 Ed. 6. does not extend where the outlaw is apprehended, and does not render himself. R. 3 Mod. 47.

[A person committed for high treason, in diminishing the coin, who makes his escape before indictment, and is then indicted and outlawed, and then retaken within the year, may have *habeas corpus* to B. R. and surrender; then have *certiorari* to remove the proceedings, plead his having been beyond sea, and have the outlawry reversed. *Rex v. Roger Johnson*, H. 2 Geo. 2. Str. 824.]

So, an outlawry for high treason shall not be reversed, because process was awarded against him when out of the realm; for by the *st.* 26 H. 8. 13. and 5 Ed. 6. 11. such process is good. 3 Inst. 32. 216. Dy. 287. a.

[When

[When there has been misbehaviour in plaintiff, the court will oblige him to reverse an outlawry at his own costs; but if it is a mistake or error in law, it must be by writ of error. *Lloyd v. Williams*, P. 8 Geo. 2. B. R. H. 123.]

[Outlawry shall not be set aside for irregularity, on motion, because it is on debt by original in B. R. *Bonnds v. Allen*, M. 10 Geo. 2. B. R. H. 317.]

[If in debt on bond by wife *dum sola*, the husband is gone abroad and outlawed, and the wife, tho' she appears publicly, is waived, the outlawry against her shall be set aside on motion; but goods taken on *cap. utlagat.* must be deemed the husband's, tho' sworn to be her separate goods; and if she has equitable right, she must apply in equity. *Biscoe v. Kennedy*, T. 33 & 34 Geo. 2. 2 Wils. 127.]

[If defendant was prisoner, pending exigent, outlawry shall be reversed on common appearance. *Barnes*, 321.]

[Where outlawry is not special, defendants may reverse at their own expence, and payment of costs on common appearance; if before transcribing into the *Exchequer*, common costs to the exigent; if after, costs to the time of reversal. *Barnes*, 324.]

[If plaintiff dies after judgment, there must be *scire facias*, or outlawry shall be set aside. *Barnes*, 325.]

[Outlawry, commenced and prosecuted during defendant's residence in *Ireland*, shall be reversed without bail or appearance. *Barnes*, 325.]

[Before defendant is returned outlawed, he may supersede exigent on appearance and costs; but after, there must be bail, who are bound to pay the money, without option to render principal. *Barnes*, 326.]

[The court will stay proceedings on payment of debt and costs in a month. *Ibid.*]

[If *feme-sole* is waived specially on mesne process, and after exigent, and before outlawry, marries, the court will not interpose. *Barnes*, 321.]

[Proceedings shall not be staid because plaintiff died before return, if after day of outlawry. *Barnes*, 323.]

(C 2.) When avoided.

(C 2.) *By plea.* An outlawry may be avoided in two manners, by plea, or by writ of error. *Co. L. 259. b.*

[But tho' illegal and void, it cannot be set aside by a third person in a collateral action. 1 *Bl. Rep.* 20.]

If an outlawry be voidable for matter appearing upon the record, the party in the same term may reverse it by plea. *Co. L. 259. b. Bend. pl. 137.*

As, for omission of any process. *Co. L. 259. b.*

Or, variance. *Co. L. 259. b.*

If outlawry does not lie in such case. *Semb. Dy. 223. a.*

Or, process was superseded before outlawry pronounced. *Dy. 223. a. Bend. pl. 15. R. Mo. 73. 1 And. 36.*

If no proclamation where the party was commorant at the time of the exigent. *R. Dy. 214. Bend. pl. 155. 1 And. 36.*

Or, no addition to the defendant. *R. Bend. pl. 212. Mo. 70.* If

If no return upon process.

Or, the sheriff was removed, and another appointed upon record before the return. *R. Dy. 41. b.*

So, for any cause, except want of proclamation, the party shall avoid the outlawry upon motion, where he comes in *gratis* upon the *exigent*, *alias*, or *pluries*. *Sal. 496.*

So, if he comes in another term. *1 And. 36.*

So, *in favorem vite*, outlawry in felony may be reversed by plea, if it be voidable, for death, imprisonment, out of the realm, &c. *Co. L. 259. b.*

But in *B. R.* an outlawry shall not be reversed by plea, but by error only, in the same term as well as in another, tho' it be error appearing upon the record. *1 Rol. 743. l. 10.*

If a man comes in upon the return of the *capias utlagatum*, he may plead, in avoidance of the outlawry, a matter which may avoid it by plea. *Co. L. 259. b.*

And upon the plea, and security given, there shall be restitution of the goods. *Hard. 98.*

So, if there be matter appearing upon record to avoid the outlawry, the party, who appears as *tertenant*, must demur, upon return of the inquisition taken upon the *capias utlagatum*. *Hard. 58, 59.*

And several *tertenants* may join in demurrer. *Hard. 59.*

So, a *tertenant* may plead to the inquisition.

[The prisoner must first plead to the outlawry, and that must be tried before he can plead to the indictment, *Rex v. Johnson, H. 2 Geo. 2. Str. 824.*]

[He may plead *ore tenus*, the attorney-general reply *ore tenus*; the venire is awarded returnable *instanter*; the jury returned sitting the court; he may have counsel; he has no peremptory challenge. *Ibid.*]

[The court cannot assign the defendant counsel on an outlawry for treason till he has pleaded, and then he may have counsel on the collateral matter. *Rex v. Davies, T. 31 Geo. 2. 1 B. M. 638.*]

[The court will allow attorney-general to confess error in fact, tho' not true, but not error in law, if not true. *Ibid.*]

[If defendant pleads, not the same person, it is tried *instanter*. *Ibid.*]

[If an exception goes to shew that the outlawry is a nullity, it avoids it without writ of error. *Ibid.*]

[If error in fact is alleged, the court may give defendant leave to plead to the indictment; if error in law, there must be writ of error. *Ibid.*]

(C 3.) *By motion.*] So, a man, *ut amicus curie*, may avoid an inquisition upon an outlawry, by matter apparent in it, upon motion. *R. Hard. 86.*

[It is discretionary, when to reverse on motion or not; if defendant hath been long abroad, the court will not reverse at plaintiff's expense. *Barnes, 324, 325, 326.*]

[The court will not set aside outlawry for want of proclamation on motion. *Barnes, 323.*]

(C 4.) *By error.*] But generally, where the outlawry is voidable for matter of fact, if it be not in felony or treason, it must be avoided by writ of error. *Co. L. 259. b.* So,

So, an outlawry may be reversed by error, in treason or felony.

[A writ of error on an outlawry (even for felony) is never denied, if the witnesses are living *Rex v. Macartney*, T. 2 G. Fort. 38.]

[The attorney-general will not grant fiat for writ of error till defendant is in actual custody on *cap. utlag.* *Rex v. Wilkes*, P. 8 G. 3. 4 B. M. 2527.]

And in treason there is no need of a *scire facias* to the lords mediate or immediate; for no forfeiture accrues to them. R. 4 Mod. 366.

So, in felony, if it be suggested that he has no lands, and the attorney-general confesses it, there is no need of a *scire facias*. Sal. 495.

Otherwise, where the defendant has lands which for felony are forfeited to the lord of whom held. *Ibid.*

If two are outlawed in the same action, and only one appears to reverse it, error shall be in the name of both, till the other appears, and is summoned and severs. R. Sal. 496.

And he was obliged to appear in person, till the *st.* 4 & 5 W. & M. 18. *Vide Attorney*, (B 6.)

[A person outlawed for want of appearance to an indictment, for a libel against the government, shall have a writ of error, and be admitted to bail. *Rex v. Earbery*, P. 9 G. Fort. 37.]

[No bail is given in error of an outlawry till reversal; and then it is to appear to an original, to be brought in two terms. *Ducket v. Martin*, T. 6 G. 2. Str. 951.]

[But on reversal special bail must be given, tho' there was no affidavit originally of the debt, if the debt was bailable. 2 Str. 1178. 1 Will. 3.]

If error is brought, and the attorney-general confesses it, it shall be reversed, and the defendant immediately tried upon the indictment. Sal. 495.

If he assigns error for being out of the realm, it is sufficient to say generally; *quod tempore utlagar. fuit.* R. 2 Rol. 12.

Tho' he goes after the *exigent*; for, if he was then here, it shall be shewn on the other part. R. 2 Rol. 804. l. 45.

[Outlawing a man beyond sea is error, not irregularity. *Barnes*, 319.]

[If one *exigent* be awarded against the principal and accessory together, it is error only as to the accessory. *Rex v. Yandell*, H. 32 Geo. 3. 4 T. R. 521.]

(C 5.) *Party restored after reversal.*] If the outlawry is reversed, the party shall be restored to all he lost.

If a term be sold by the king, he shall be restored to the term. *Per two J. Cro. El.* 278. R. 1 And. 277. R. 2 Ver. 315.

If a lease be made by the *Exchequer* to the plaintiff of the lands of the outlaw, and he levies the profits by *Exchequer* process, which, by order of the court, are delivered to him; yet they shall be restored upon the reversal of the outlawry. 2 Jon. 101.

But, if the king's lessee be outlawed, his term shall not be restored; for it was extinct. R. Mo. 237.

So, he shall have all his lands and tenements.

Tho' the king has granted them to another and his heirs. 1 And. 188. And

And he may enter, upon reversal of the outlawry, without petition or *scire facias*. R. 1 And. 188.

So, he shall be restored to a presentation to an advowson.

So, to all his goods and chattels.

To his stock in the *East India* or any other company, tho' granted to another by privy seal. 2 Ver. 313. 2 Lev. 49. cont.

So, if the king's grantee acknowledges satisfaction upon a judgment, it shall be set aside in equity, and restitution made. 2 Ver. 313.

So, a lessee of the outlaw shall have trespass for the profits received between the assignment to him and the reversal. R. Cro. El. 270.

But the profits of the lands, received during the outlawry, shall not be restored. 2 Ver. 313.

Nor *East India* stock granted to A. by privy seal, and transferred to him by the company, where the restitution was to all, *quod non fuit nobis responsum*. R. 2 Lev. 49.

(D) Forfeiture by Outlawry.

(D 1.) In Treason or Felony.

IF a man is outlawed for treason or felony, he forfeits all his lands and tenements, goods and chattels. *Vide Forfeiture*, (B 1, &c.)

So, money received by his servant, and brought to his house, tho' not delivered to him. Sav. 40.

(D 2.) In Personal Actions.

(D 2.) *What things are forfeited.*] A man outlawed in a personal action forfeits his goods and chattels. 2 Rol. 806. l. 40. 1 Sal. 395.

And his chattels real; as, a term for years, &c. 2 Rol. 806. l. 43.

And the trust of a term. 1 Sal. 109. R. Hob. 214. Hard. 496.

If tenant at will sows his lands, and is outlawed, the king shall have the emblements. 2 Rol. 806. l. 50.

If a church is void, and afterwards the owner is outlawed, it shall be forfeited to the king. 2 Rol. 807. l. 17. Ca. Parl. 75.

So, if the church becomes void after the outlawry, the king shall present. 2 Rol. 807. l. 45.

So, the king shall have all the profits of his freehold lands. 2 Rol. 807. l. 32.

So, if the lessor is outlawed, the king shall have the profits of his tenant at will; for by the outlawry the will is determined. 2 Rol. 807. l. 35.

[The goods of a tenant are liable to a year's rent, notwithstanding an outlawry in a civil suit. *St. John's College Oxford v. Murcott*, B. R. E. 37 Geo. 3. 7 T. R. 259.]

So, if a man be outlawed after a judgment recovered by him, the king shall have the profits of all the defendant's lands, tho' the plaintiff can have only a moiety in execution. R. 2 Cro. 513.

So, if the king's lessee is outlawed, he forfeits his lease. R. Mo. 237.

So, a man outlawed forfeits stock in the *East India* company, &c. 2 Lev. 49. 2 Ver. 313.

So, upon a *levari facias*, after an inquisition upon an outlawry, a stranger's

stranger's cattle, *levant and couchant* upon his land, may be seized and sold; for they are the issues or profits of the land. *R. Skin. 618. Vide post. (D 4.)*

So, a bond to *A.*, who was trustee for *B.*, will be forfeited by the outlawry of *B.* *R. 2 Rol. 807. l. 15. 2 Cro. 512, 513.*

If a man recovers damages in a personal action, and afterwards is outlawed, the king shall have the damages and execution for them upon the judgment. *R. 2 Rol. 807. l. 2.*

If the conusee of a statute sues an extent, and has the conusor in execution, and afterwards is outlawed, the debt is forfeited, and the king may discharge the conusor; for his body is not a satisfaction. *R. 2 Rol. 807. l. 5.*

So, if *A.* has judgment against *B.*, who holds jointly with *C.*, who aliens, and afterwards *A.* is outlawed, the king shall have an extent for the moiety of *B.*, tho' the alienation was before the outlawry. *R. Lane, 20.*

So, if a statute is acknowledged to two, and ones sues execution, and afterwards is outlawed, it will be a forfeiture of the debt against both. *R. 2 Rol. 808. l. 30.*

So, if a bond be made to two, one of whom is outlawed, the whole bond will be forfeited. *Semb. 1 Rol. 7.*

(D 3.) *What not.*] But by outlawry in personal actions a man does not forfeit any lands, of which he has an estate of freehold. *2 Rol. 807. l. 30.*

Nor, a rent-charge for life, nor arrears which accrue for the rent during his life. *Hut. 54.*

[Copyhold lands are not liable to be seized; and, if they are, and a *venditioni exponas* issued, it shall be quashed. *Rev. v. Budd, T. 31 G. 2. Parker, 190.*]

If *A.* seized in fee leases for years, and is outlawed, the king shall not have the profits during the term. *Bro. Patent, 3.*

So, he does not forfeit debts due to him upon contract. *2 Rol. 806. l. 52.*

Or, other *chose en action.* *Semb. Sav. 40.*

Nor, the equity of redemption of a term. *Semb. 2 Ver. 314.*

Nor, money due to him upon mortgage. *Hut. 53.*

So, he does not forfeit a thing of which the interest was not vested in him; as, if lessee at will sows his land, and the lessor is outlawed, the king shall not have the emblements. *2 Rol. 807. l. 35.*

If a *feme-covert*, possessed of a term for years, be waived, the king shall not have the term. *2 Rol. 806. l. 45.*

If an executor is outlawed, he does not forfeit the goods which he has of the testator's. *2 Rol. 806. l. 47.*

Nor, the goods which he himself recovered as executor. *2 Rol. 806. l. 35.*

Nor, the cattle of a stranger, *levant and couchant* upon his land. *R. Skin. 617. cont. Vide ante, (D 2.)—Post. (D 5.)*

So, a lease by the king to a man outlawed will be good; for he has a capacity to be a farmer to the king. *R. Mo. 237.*

(D 4.) To whom the Forfeiture shall be.

If a man is outlawed, the forfeiture shall be to the king.

Tho' he is outlawed in a personal action.

So,

So, if the lessor of lands, within a county *palatine*, is outlawed, tho' the count *palatine* has the goods of the outlaw within his precinct, yet the king shall have the arrears of rent; for it follows the person. *Dub. 2 Rol. 808. l. 40. Lane, 90.*

Yet the outlawry in a personal action shall be for the benefit of the party, if he pleases; and therefore, if the defendant is taken upon a *capias utlagatum*, after judgment upon prayer he shall be in execution for the party. *Ca. Parl. 73. Doug. 547. 4 Burr. 2549. Vide Execution, (B 2.)*

So, the king may grant the benefit of an outlawry to another. *R. 2 Rol. 188. l. 5.*

(D 5.) How Advantage shall be taken of it.

So, upon the outlawry, a general *capias* lies against the person outlawed.

Or, a special *capias utlagatum*, by which the sheriff is commanded *quod per sacramentum, &c. inquirat quæ bona aut catalla, terras aut tenementa habuit die utlagar. et ea extendi et appreciari fac., &c. Off. Br. 35.*

And thereupon the sheriff returns an inquisition taken by him. *Lut. 330.*

[If a man is outlawed in a civil action, and extent, inquisition, and *levari facias*, and 5*0*l. levied thereon, it may not be paid to plaintiff on motion, tho' defendant consent, if nobody consents for the crown; for it belongs to the king, if a lease is not taken out. *Rex v. Fowler, in Sc. H. 1718, Bunb. 38.*]

If the land be under-valued, there may be a *melius inquirendum*. *Hard. 106.*

And such inquisition must be as certain as an indictment or declaration. *Semb. Hard. 58.*

And therefore, if it finds several parcels of land, without saying of what nature, it will be bad, tho' it mentions the value and tenants' names. *R. Hard. 59.*

But it is sufficient if it shews the value of the lands *in toto*, tho' it does not shew the value of every particular parcel. *R. Hard. 7.*

So, if it finds two marshes of such a value in the possession of B., tho' it does not say how many acres. *R. Hard. 59.*

Or, a close called D., tho' it does not mention quantity or quality. *Hard. 76.*

So, *de 6 clausis terræ et pastur de messuagio sive tenemento, &c.* are sufficient; for being only an office for information, so much certainty is not necessary as in an office to entitle. *R. Hard. 191.*

So, the return may be good in part, and quashed for part. *R. Hard. 59.*

So, if there be a variance in the outlawry returned to the *Exchequer* from the record in C. B. it may be amended. *R. Hard. 7.*

So, an information lies in the *Exchequer*, in the nature of trover, against him who has goods of the outlaw, and does not deliver them. *R. Per Hale, 1 Mod. 90.*

So, after the inquisition returned in C. B. a transcript thereof shall be transmitted to the *Exchequer*, and thereupon a *scire facias* goes against him who has goods of the outlaw in his hands. *Lut. 331.*

So, by bill by the attorney-general in the *Exchequer*, a discovery of his real and personal estate, and the grants made of it, may be required;

quired; for the outlawry is in the nature of a judgment for the king. *R. upon Demurrer, Hard. 22.*

So, a common person may demand a discovery against an outlaw by bill, to enable him to take out execution. *Hard. 22.*

So, where a man is outlawed in a personal action, the king may take the profits of his freehold; as, the rent, corn, grafs, &c. *2 Rol. 808. l. 5.*

And may grant to another to levy the profits in his name. *2 Rol. 808. l. 22.*

So, he may make a lease to the outlawed person himself; for he is capable as a farmer. *R. Mo. 237. Vide Infra.*

[On an inquisition on an outlawry, a term for years cannot be sold by the sheriff; for the profits only are forfeited to the king. *Semb. Rex v. Blunt, P. 1722, Bunb. 104.*]

So, the cattle of a stranger, *levant and couchant* upon the land, shall be taken as the issues of the land. *R. 1 Sal. 395. 5 Mod. 117.*

So, the cattle of a commoner, or tenant in common, if his title is not found by the inquisition. *1 Sal. 395.*

So, it is the usual course of the *Exchequer*, to grant a lease of the lands of the outlaw to the party who sues the outlawry. *Ca. Parl. 72. Hard. 106. R. Mo. 237.*

[If, defendant being outlawed, plaintiff gets a lease from the crown, and is obstructed, he cannot have an injunction to put him in possession, but he may bring trespass for the profits, or have an ejectment. *Sed Qu. de cer. Tiffin v. Jackson, H. 1728, Bunb. 261.*]

[The king, under an outlawry, or his lessee, may redeem a mortgage. *Attorney-General v. Basnett, M. 12 W. 3. Parker, 268.*]

And the lessee may take the profits to the value extended, but not the other profits, if they are of greater value, before a *melius inquirendum*, which finds the full value. *R. Hard. 106.*

So, the party at whose suit he was outlawed, may obtain a grant of the lands by privy seal.

If the lands of the outlaw are seized, and the inquisition returned, the outlaw, by his feoffment or sale afterwards, cannot defeat the king, &c. of the profits. *R. 1 Lev. 34.*

So, they cannot be afterwards extended by *elegit*, upon a judgment before the outlawry. *R. Ca. Parl. 75. R. Hard. 106. R. if there be no covin. Sal. 495.*

So, the heir or feoffee of the defendant shall be bound by the outlawry. *1 Sal. 395.*

But the king has not the possession of freehold land; for he cannot grant or lease generally. *2 Rol. 808. l. 20. 15.*

Neither can he plough the land to sow. *2 Rol. 808. l. 7.*

Nor, seize the land; for then, upon pardon or reversal of the outlawry, he would be put to sue *livery*. *2 Rol. 808. l. 12.*

Neither can he cut trees or underwood. *2 Rol. 808. l. 10.*

And a man outlawed may make a feoffment, whereby the king is deprived of the subsequent profits. *2 Rol. 808. l. 17.*

But this is intended of a feoffment before seizure for the king. *1 Lev. 34. 1 Sal. 395.*

So, if he levies a fine before seizure, the estate passes. *R. 1 Lev. 33. Ray. 17.*

Or, makes a bargain and sale. *Semb. 1 Lev. 33.*

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So, before seizure, execution may be upon the land by *elegit*.
Semb. 1 Lev. 33. R. Hard. 75.

So, if, before the inquisition returned, he makes a lease *bonâ fide* for a valuable consideration. *R. Hard. 101.*

And an assignment by such lessee, after the inquisition returned, will be good. *R. Hard. 422.*

So, a stranger, having title before seizure, may enter and maintain an ejectment. *R. Hard. 176.*

So, by a feoffment after seizure, the estate passes to the feoffee, tho' the king shall have the profits during the outlawry. *1 Sal. 395.*

So, the lessee of lands, seized by outlawry, shall account for the profits (which he might have received without his default) to another creditor of the outlaw, who has an interest in the land. *Hard. 106.*

Personal chattels are forfeited and vested in the king by the outlawry before inquisition found. *R. 1 Sal. 395. Vide Forfeiture, (B 4. 6.)*

But chattels real, and the profits of land, are not forfeited, till inquisition found. *1 Sal. 395.*

[Where there are two outlawries at different times, the first inquisition shall prevail. *Bradnel's Case, M. 36 C. 2.*]

[Where there are two outlawries on one day, the first inquisition shall be preferred. *Pain v. Dews, P. 21 C. 2.*]

[Where there are two inquisitions on one day, the first outlawry shall be preferred.]

[Where there are two outlawries on one day, and both inquisitions on one day, the first lease shall be preferred. *Rex v. Willes, M. 22 Geo. 2. Parker, 85.*]

Utlagatum Capias.

Vide Pleader, (2 W 6.)

WAGER OF LAW.

Vide Pleader, (2 W 45.—2 X 4.)

W A G E S.

— of Mariners, &c.

Vide Admiralty, (E 15.)

— of Servants, &c.

Vide Justices of Peace, (B 51. 60.)

W A I F E.

(A) Waife.

(A 1.) What shall be.

IF a man steals goods, and being pursued, for fear of being apprehended, waives the goods out of his possession, those goods are said to be waife. *5 Co. 109. a.*

So, if he thinks he is pursued, and having the goods in his possession flies, and waives the goods. 5 Co. 109. a.

Or if, to ease him in flight, he waives them. *Stamf. Pl. Com.* 186.

Tho' the thief leaves the goods at a common inn. *R. 2 Rol.* 809. l. 15.

(A 2.) What not.

But if a thief steals goods, and conceals them in the ground, or other secret place, and afterwards flies, they are not forfeited as waife. *R. 5 Co.* 109. a. *Mo.* 572. *Cro. El.* 693.

Or, if he throws them into the house or manor of another, and there leaves them and flies. 5 Co. 109. a.

Or, if a man takes goods as a trespasser, and waives them. *Stamf. Pl. C.* 186. b.

Or, if he flies for fear of being apprehended, when he has not the goods in his possession. 5 Co. 109. a.

So, if a man is robbed, who had a safe-conduct, *tam in bonis quam in corpore*, and the thief upon pursuit waives them, those goods are not waifes. *Stamf. Pl. C.* 186. b.

So, if a thief leaves a horse, stolen, at a common inn for his meat, it is no waife. *R. 2 Rol.* 809. l. 10.

So, the goods of an *alien* cannot become waifes. *Pal.* 14.

All goods waived are forfeited to the king, and he shall keep them as his own, *Stamf. Pl. C.* 186. for the owner loses his property, because he did not freshly pursue the felon. 5 Co. 109. a.

And the king's bailiff, or another in the king's right, may seize them. *St. P. C.* 186. a.

But before seizure by the king or his patentee, the owner of the goods may take them, tho' it be twenty years after the stealing. *St. Pl. C.* 186. b.

So, after seizure, if he makes fresh suit, and attaints the felon for such felony. *Ibid.*

And, by the common law, this was only when the felon was attaint in an appeal at the party's suit. 5 Co. 109.

But now, by the *st.* 21 H. 8. 11. if the felon be indicted and attaint by evidence given by the party, he shall have restitution of his goods. 5 Co. 111. a.

So, if the lord seizes goods as waife, he will not be excused for misuser, if there be fresh suit. *R. 2 Leo.* 192.

(B) Bona Fugitivorum et in Exigend. positorum.

BONA fugitivorum are the goods of him who is found upon record to have fled for felony; for, upon the presumption of his guilt he forfeits all his goods, which he had at the time of his flight, to the king. 5 Co. 109. a. *St. Pl. C.* 183. b.

If the jury, who find the flight, acquit him of the felony. *St. Pl. C.* 183. b. 5 Co. 109. b.

[Flight, on a charge of felony, induceth forfeiture of goods, because he hath done what in him lay to stop the course of public justice; not, on a legal presumption of guilt, which must be at an end, on acquittal. *Foster*, 272.]

So,

So, if it be found by inquest before the coroner, that he fled, tho' the jury, who try him, acquit him of the felony and also of the flight; for the king may hold to the record, which makes most for his advantage. *St. Pl. C. 183. b. 5 Co. 109. b.*

And such finding is not traversable. *St. Pl. C. 183. b.*

So, if it be found by verdict that an accessary before, or after fled. *St. Pl. C. 184. a.*

Or, by inquest before the coroner, that an accessary before fled. *Ibid.*

So, if the flying was only for *petit larceny*. *Ibid.*

So, a man forfeits his goods by the flight found, tho' he has a pardon of the felony. *Ibid.*

Tho' the flight was before or after arrest. *Ibid.*

Or, he was killed in his flight, so that he cannot be acquitted or attainted. *St. Pl. C. 184. a. 5 Co. 109. b.*

So, if a man, accused of felony, does not appear, but process goes till an *exigent* is awarded against him, he forfeits his goods, tho' he be afterwards acquitted; for it is *tantamount* to a flight. *St. Pl. C. 184. b. 5 Co. 110. b.*

Tho' there be a fault in the writ or count, for which the writ abates. *St. Pl. C. 184. b.*

Or, he was imprisoned after *exigent*, by which the outlawry upon it is reversed. *St. Pl. C. 184, 5.*

But a man does not forfeit goods by flight found, if he is not afterwards indicted, if he is afterwards alive. *St. Pl. C. 184.*

Nor, if the flight is found before the coroner; when he has no jurisdiction; as, if he finds the flight of an accessary after the fact. *St. Pl. C. 184. a.*

So, if he does not forfeit by award of an *exigent*, if the *exigent* be reversible. *St. Pl. C. 184. b. 5 Co. 111. a.*

(C) Bona Felonum.

BONA felonum are the goods of any one convicted of felony; for he forfeits to the king all his goods and chattels, which he had at the time of the conviction. *5 Co. 110. a.*

So, a clerk convicted forfeits all the goods which he had at the time of conviction, or after, till purgation or pardon. *St. Pl. C. 185. 5 Co. 110. a.*

So, now, when by *ft. 18 El. 7.* after clergy allowed, he shall be burned in the hand, and immediately delivered, he forfeits the goods which he had at the time of conviction, tho' not such as he had after. *R. 5 Co. 110.*

So, if a man be *felo de se*, he forfeits all the goods which he had at his death, if he is found *felo de se* by inquest before the coroner, or by presentment before justices, who have consue of felony. *R. 5 Co. 110. b.*

By grant of the goods *fugitivorum et felonum*, the grantee shall have the debts and specialties of fugitives, &c. as well as other goods, tho' there are no special words. *2 Rol. 195. l. 20. Dub. 2 Leo. 56.*

And it shall be a debt where the specialty was, not where payable. *R. 2 Leo. 56.*

The goods of fugitives or felons can only be claimed by the king, or by his grant. 5 Co. 109, 110.

And not by prescription; for they are not forfeited, till found upon record. 5 Co. 110.

Yet a county *palatine*, which has *jura regalia*, may also claim *bona felon.* by prescription. R. 1 Rol. 399.

If the king grants to B. *bona felonum qualitercunque damnator*, of his tenants, he shall have the goods; if the tenant be attainted of petty treason, as well as other felony. 2 Rol. 194. l. 53.

But the grantee shall not have the goods of those attainted of high treason. 2 Rol. 194. l. 50.

(D) Bona Confiscata.

SO, if the owner omits any part of the goods stolen, in his appeal, they are forfeited to the king in respect of the connivance. 5 Co. 110. a.

So, if he brings a malicious appeal; as, for his goods which the appellee had by his bailment or by finding. 5 Co. 110. a.

So, if a man is indicted for stealing goods, which were his own goods, and he disclaims them, they are forfeited to the king; for *capit fiscus*. St. Pl. C. 186. a.

Or, if a felon disavows the goods taken in his possession, and afterwards he is attainted for other goods. *Ibid*.

(E) Deodand.

(E 1.) What shall be,

OMNIA quæ movent ad mortem sunt deodanda. Dy. 77. b. 5 Co. 110. b.

And, therefore every beast, or thing moveable inanimate, which occasions the death of a man within the body of a county, without the default of himself or another, shall be forfeited to the king as a *deodand*; to be employed in *elemosynam*. 3 Inst. 57.

Tho' the thing was not in motion at the time, if it be moveable. St. Pl. C. 20.

And, as well where the man by misadventure falls upon the thing, as where the thing falls upon him. *Ibid*.

And therefore, if the sword of B. is used by A., and another is killed with it, it will be a *deodand*. 3 Inst. 57. H. 33.

If a man falls from a ship into fresh water, and is killed, the ship will be a *deodand*. H. 33.

If he falls from a horse when he plunges in the water. *Semb*. 2 Rol. 23.

If an animal kills a child under fourteen, viz. age of discretion, yet it shall be a *deodand*. 3 Inst. 57. H. 33. Per two J. *semb*. Ray. 208.

And all things moving with the thing which occasioned his death, are *deodand*. St. Pl. C. 20. b.

So, if a man, riding upon a carriage, falls from it, and the horses draw the carriage upon him, by which he dies, the horses and carriage are *deodand*. St. Pl. C. 20.

So, if the carriage be loaden with hay, the hay and the carriage are *deodand*. St. Pl. C. 20. b. So,

So, tho' he falls from the carriage by the motion only of one horse.
St. Pl. C. 20. a.

So, if a man is thrown from a carriage, by overturning, under the wheel of a waggon next to it, and the waggon, being loaden, goes over him and kills him, the carriage, waggon, loading, and horses are *deodands*. *R. 1 Sal. 220.*

So, if a horse throws a man into the water, and the wheel of a mill kills him, the horse and wheel are *deodands*. *1 Sal. 220. Vide post. (E 2.)*

If one tree falls upon another, which causes the death of a man, both trees are *deodands*. *1 Sal. 220.*

[But *deodands* do not meet with countenance in *Westminster-hall*; when a jury has found too little, the courts will not interpose in favour of the crown, or lord of the franchise (tho' they will, if it has found too much in favour of the subject): *Foster, 266.*]

[Thus if *A.*, sitting on his waggon, falls, the horses draw on the waggon, the fore-wheel crushes his head, and he dies, and the coroner's jury find the wheel only is the *deodand*, the court will not quash the inquisition. *Rex v. Rolfe, Coroner of Kent, M. & H. 5 G. 2. Rex v. Drew, Coroner of Middlesex, M. 29 G. 2. Foster, 266, 267.*]

[No man can prescribe to it; it must be by the king's grant. *Foster, 266.*]

(E 2.) What not.

But a thing which does not move with that which is the cause of the death is not a *deodand*, tho' it is joined to it; as, if a man falls from the wheel of a carriage, and is killed, but the carriage does not move, the wheel only shall be forfeited. *St. Pl. C. 20.*

If a man falls into the water, and is carried by the water under a mill, and there pressed to death by the wheel of the mill, the wheel only shall be forfeited, *St. Pl. C. 20. b. Vide infra.*

If a man falls from his horse upon a trunk, and breaks his head upon it, by which he dies, the horse only shall be forfeited. *St. Pl. C. 20. b.*

If he is thrown, by the motion of the horses, from a cart laden with litter, the cart and horses are *deodand*, not the litter. *Ibid.*

If thrown from a horse, by the violence of the water, into the river, the horse is not a *deodand*. *R. 2 Cro: 483. Acc. 2 Rol. 23. Pop. 136.*

So, a thing fixed to the freehold shall not be a *deodand*; as, a door or gate of a house, forced by the wind against a man, whereby he is killed. *Per two J. 1 Sid. 307.*

Nor, a bell fixed to a church. *Semb. 1 Sid. 207. Mod. Ca. 187. 1 Lev. 136.*

Nor, a sail of a windmill. *1 Sid. 207.*

Nor, a mill-stone or wheel of a mill. *R. Mod. Ca. 187. D. Ray. 97.*

Nor, a tree not severed, but blown by the wind against another. *1 Sid. 207.*

Nor, a thing consecrated before; as, a bell, which falls upon a ringer. *Cont. St. Pl. C. 20. Semb. acc. 1 Sid. 207. 1 Lev. 136. Ray. 97. Cont. Dy. 77. in Marg.*

Nor, a ship in the sea, or salt water. *St. Pl. C. 21. a. 3 Inst. 57. H. 33.*

So, if a child, within the age of discretion, (*viz.* under fourteen,) falls upon a thing moveable, and is killed, it shall not be a *deodand*. *3 Inst. 57.*

Or, falls from a cart, ship, horse, &c. *H. 33.*

A *deodand* shall be forfeited to the king, or to him who claims by the king's patent. *Dy. 77. a. 107. b.*

And by inquisition before the coroner, it must be found, that it is *deodand* and the value. *St. Pl. C. 21. a. H. 34. Greenwood, 22.*

(F) Estray.

IF any man's cattle stray into the king's manor.

So, if they stray into the manor of any other lord, who has title to *estrays* by prescription or grant, and continue there for a year and a day (being proclaimed at the next markets and churches) without challenge, the property is vested in the lord. *Britt. Ca. 17. Bend. pl. 27.*

A swan may be an *estray*. *1 Rol. 878. l. 30. 7 Co. 17.*

So, if cattle stray into the manor of *A.*, and within the year stray to the manor of *B.*, and continue there for a year and a day, and are proclaimed, *B.* shall have them as *estrays*. *1 Rol. 878. l. 40.*

So, if the first manor was the king's manor. *Qu. 1 Rol. 878. l. 40.*

So, if *A.* leases his manor, in which an *estray* was, before the year expired, and then the year and day expire, the lessee shall have it, and not the lessor; for he had the custody only during the year, and the property vests in him who has the custody at the end of the year and day. *R. 12 Co. 101.*

So, if a stranger, within the year, takes the cattle, and puts them into the manor again as his own, and they continue there for a year and a day, they will be an *estray*. *Semb. 1 Rol. 879. l. 3.*

But, if it does not continue in the manor for a year and a day, without challenge, it will not be an *estray*; as, if the lord puts it into a place out of the manor. *R. Pal. 486.*

Tho' it continues for three quarters of a year, and then continues in another manor or land, to which it strayed, for the residue of the time.

And the lord cannot retake it, if it strays into another's land before the year expires; for no property is vested in him till after a year and day. *Bro. Estray, 11. Cont. 12 Co. 101. R. that he may, if the other does not seize it as an estray. Hut. 67.*

So, if the lord, or his bailiff, does not seize it as an *estray*, it shall not be so; for that begins the property, and the lord may chase it out of his land if he pleases. *R. Hut. 67.*

So, cattle which come for common, cannot be *estrays*, tho' they continue there above a year and day. *Bro. Estray, 13.*

Nor, the king's cattle, which come into the manor of another for a year and day. *1 Rol. 878. l. 35.*

So, it will not be an *estray* by the common law, tho' it continues for a year and day, if it be not proclaimed at the two next markets, at least upon market-days. *Bro. Estray, 3, 4, 5. 10.*

And at two markets within the same county. *Semb. 1 Rol. 878. l. 47. And*

And also at two parish churches. *Semb. Cro. El.* 716.

So, if the lord uses cattle taken as an *estray*, by riding, work, &c. he will be a trespasser *ab initio*. *R. 2 Cro.* 147. *Yel.* 96. *1 Rol.* 879. *l.* 15. *12 Co.* 101.

So, a custom alleged, to put cattle taken as an *estray* into a moor, part of the manor, and there fetter them, if they are unruly, is not good. *R. 1 Rol.* 879. *l.* 25.

But using an *estray* for necessity is justifiable; as, to milk a cow. *R. 1 Rol.* 879. *l.* 20. *2 Cro.* 148. *12 Co.* 101.

To put fetters upon a colt, which cannot be otherwise kept within the fences. *Per Tanf.* *1 Rol.* 879. *l.* 30. *Hut.* 67. *Winch.* 68. 124.

So, he may put it in his stable. *Hut.* 67.

So, if the owner challenges the cattle, seized and proclaimed as an *estray*, within the year, the lord may detain them till reasonable amends are tendred for his pasture. *R. 1 Rol.* 879. *l.* 35. *Bro. Estray*, 1. *12 Co.* 101. *Hut.* 67.

And the detainer is justifiable, if he does not tender reasonable amends, tho' the lord demands what is unreasonable. *1 Rol.* 879. *l.* 40.

Yet the owner may take upon an offer of amends, tho' he does not tender a certain sum. *R. Sal.* 686.

If the lord dies before the year expires, and afterwards the *estray* continues in the manor for the year and day; yet the executor of the lord shall have it, and not the heir; for when the year is expired, the property relates to the seizure. *Mo.* 11.

After seizure, the lord shall be charged for trespass done by an *estray*. *Hut.* 67.

And he shall have a replevin, if a stranger takes it. *Ibid.*

Or, trespass. *Winch.* 68.

(G) Treasure-trove.

Treasure-trove is when a man finds coin or plate, of gold or silver, the owner whereof is not known, then it belongs to the king. *St. Pl. C.* 39. *5 Co.* 108. *b.* 3 *Inst.* 132.

If it is found in the ground, a wall, or other place. *3 Inst.* 132.

So, it may belong to another by prescription, or the king's grant. *Ibid.*

But it is not said to be *treasure-trove*, if it be other metal than gold or silver. *Ibid.*

Or, if it be found upon the land, and not under ground, in a wall, &c. *St. Pl. C.* 39.

Nor, if the owner can be known. *Ibid.*

Tho' the owner be dead; for his executor or administrator shall have it. *St. Pl. C.* 39. *b.*

He who finds treasure ought to give notice thereof immediately to the king's bailiff, &c. or coroner. *St. Pl. C.* 40. *a.*

And the coroner may inquire of the treasure found, and by whom. *St. Pl. C.* 40. *a.* 49, 50. *b.*

(H) Mines.

(H 1.) Of Gold or Silver.

BY the common law, all mines of gold or silver within the realm belong to the king, whether they are within the lands of the king, or of a subject. *R. Pl. Com.* 313. 336.

Tho' they are not mentioned in the *ft. 17 Ed. 2. de Prærogativa Regis*; for there are several of the king's prerogatives not mentioned there. *Pl. Com.* 322. *a.*

So, all mines of copper, tin, lead, iron, or other base metal, in which *aliquid auri aut argenti habet.*, for such are royal mines. *R. per nine J. three cont.*

If the gold or silver does not exceed the base metal in value. *Pl. Com.* 336. *b.*

And the Reporter makes a quære, if the gold or silver are not of greater value, otherwise the king will have all mines. *Pl. Com.* 340. *a.*

So, liberty of digging and carrying away the ore, and all necessary incidents, belong to the king. *Pl. Com.* 336.

And tho' the king grants lands in which mines are, and all mines in them; yet royal mines do not pass. *R. Pl. Com.* 336. *b.*

[In a grant of lands from the crown, if there is a bare reservation of royal mines, without right of entry, the crown cannot grant licence to another to search for such mines; but if they are once opened, it can restrain the grantee from working them, and work them itself, or grant licence to another so to do. *Lyddal v. Weston, M. 1739, 2 Atkyns, 19.*]

But the king, by apt words, may grant mines of gold or silver, or other metals mixed with gold and silver, to a subject, and feyer them from the crown. *R. Pl. Com.* 336. *b.*

As, if *ex certa scientia*, &c. he grants to a stranger all mines which he has in the land of B., for the words cannot be satisfied but by royal mines there. *Per Dyer, Pl. Com.* 337. *a.*

And now, by the *ft. 1 W. & M. sess. 1. c. 30. s. 4.* no mine of copper, tin, iron, or lead, shall be taken to be a royal mine, tho' gold or silver may be extracted out of the same.

And by the *ft. 5 & 6 W. & M. 6.* the owner of any mine, wherein is copper, tin, iron, or lead, may work the same, tho' claimed to be a mine royal; provided the king, or any claiming under him, paying in thirty days after ore laid on the banks, for all clean and merchantable ore of copper, 16 *l. per ton*; of lead, 9 *l. per ton*; of tin and iron, 40 *s. per ton*, may have such ore; except tin ore in the counties of Devon and Cornwall.

(H 2.) The Stannaries.

So, the mines of tin in Cornwall are the revenue of the prince, as duke of Cornwall. 2 *Roll. 171. (K).* Vide in Courts, (L 1, &c.)

W A I V E R.

Vide Baron and Feme (R—S 4, &c.—T).—Pleader, (R 15.)

WALES.

(A) Wales.

(A 1.) Part of the Dominions of *England*.*WALES* was always feudatory to the kingdom of *England*. 2 *Inst.* 195. 4 *Inst.* 239.Held of the crown, but not parcel. *Per Cook*, 1 *Rol.* 247. 2 *Rol.* 29.And therefore the kings of *Wales* did homage and swore fealty to *H. 2.* and *King John*. *Brad. Hist.* 299. 330. 480.So, to *H. 3.* *Brad.* 663.And 11 *Ed. 1.* upon the conquest of *Leuellin* prince or king of *Wales*, that principality became a part of the dominion of the realm of *England*. 2 *Inst.* 195. 4 *Inst.* 239.And by the *st. Wallia*, 12 *Ed. 1.* it was annexed and united to the crown of *England tanquam partem corporis ejusdem*. 4 *Inst.* 240. 1 *Vau.* 300. 400. 2 *Rol.* 29. 2 *Mod. Ca.* 140.And by the *st. 27 H. 8. 26.* reciting that it was always incorporated and united, it is enacted, that the dominion of *Wales* shall continue for ever incorporated, united, and annexed, to the realm of *England*.Yet if the *st. Wallia*, made at *Rutland*, 12 *Ed. 1.* was not an act of parliament, (as it seems that it was not,) the incorporation made thereby was only an union *jure feudali & non jure proprietat*. *Vau.* 414.

(A 2.) Subject to its Laws.

Wales before the union with *England* was governed by its own proper laws. *Vau.* 300. 399. *Cro. Car.* 247. *Jon.* 255.But by the *st. of Rutland*, 12 *Ed. 1.* the king says *leges et consuetudines partium illarum fecimus recitari, quibus intellect. quasdam de consilio procerum deleuimus, quasdam permisimus, quasdam correximus, et alias adjiciend. decreuimus*. *Vau.* 400.And since laws made in *England* bind people in *Wales* (as, in *Ireland*); if it be named, but not otherwise. *Vau.* 300. 400. 415.And now, by the *st. 27 H. 8. 26.* all in *Wales* shall have and inherit all liberties, rights, privileges, and laws, in this realm, and all other his majesty's dominions, and all other his majesty's natural-born subjects.And shall be inheritable to manors, lands, &c. in *Wales*, in the same manner and after the form of the *English* laws, without division or partition, and not after any tenure or form of *Welsh* laws and customs.And that the laws and statutes of this realm, and no other, shall be had, used, and executed in the said dominion of *Wales*, in like manner as in this realm, or as by this act shall be further established.And therefore the statutes, then made or afterwards to be made, are all induced into *Wales*. *Vau.* 215.

(A 3.) Shall have its proper Counties.

By the *st. W. 12 Ed. 1.* there were six counties erected in *Wales*, viz. *Anglesey, Carnarvon, Merioneth, Flint, Carmarthen, and Cardigan*. 4 *Inst.* 239. But

But the *st.* 34 H. 8. 26. mentions *Glamorgan* and *Pembroke* also as ancient counties.

The *marches* of *Wales* were lordships lying between the counties of *England* and *Wales*, and not in any county. *Vau.* 415.

By the *st.* 27 H. 8. 26. and 34 H. 8. 26. *Wales* was divided into twelve counties; for several lordships marchers were annexed to divers shires in *England*, and several to counties of *Wales*, (*viz.* to *Salop*, *Hereford*, and *Gloucester*, in *England*; and to *Glamorgan*, *Carmarthen*, *Pembroke*, *Cardigan*, and *Merioneth*, in *Wales*;) and the residue were erected into five new counties, *viz.* *Monmouth*, *Brecknock*, *Radnor*, *Montgomery*, and *Denbeigh*, of which *Monmouth* was annexed to the realm of *England*, and the four others to the dominion of *Wales*.

(B) What Process goes to *Wales* out of the Courts of *Westminster*.

(B 1.) Mandatory Writs.

TO all the dominions acquired to the crown of *England* some of the king's writs run; as, mandatory writs out of *Chancery*. *Vau.* 401.

Such as writs of safe-conduct. *Ibid.*

Writs of protection. *Ibid.*

Ne exeat regnum. *Vau.* 402.

De leproso amovendo. *Ibid.*

De apostata capiendo. *Ibid.*

So, a writ of error. *Ibid.*

So, a *certiorari* lies to the justices of the grand sessions in *Wales* to remove an indictment for felony to *B. R.* *R.* 2 *Cro.* 484. 1 *Rel.* 395. l. 5. *Dub. Cro. Car.* 331. 1 *Rel.* 395. l. 7. *Dub.* 1 *Mod.* 64. 68. *R.* 1 *Vent.* 93. 146. *R.* 2 *Rel.* 29. *R.* *Sal.* 146. *Semb.* 2 *Mod. Ca.* 136—145. *Vide post.* (D).

So, a *habeas corpus* to remove a person indicted there. *R.* 2 *Mod. Ca.* 137.

(B 2.) *Capias Utlagatum*.

So, a *capias utlagatum* always goes directed to the sheriffs of *Wales*, for it is in the nature of a mandatory writ. *Vau.* 397. 414.

By the *st.* 1 *Ed.* 6. 10. all writs of special *capias utlagatum*, single *capias utlagatum*, *non molestandum*, and all other process for or against any person outlawed, may be directed to the sheriff of any of the counties in *Wales*.

(C) What Process does not go thither.

BUT the union of *Wales* to the kingdom of *England* by the *st.* *Wallia*, 12 *Ed.* 1. or by the *st.* 27 H. 8. 26. does not subject *Wales* to the jurisdiction of the courts of *England*. *Vau.* 400. 415.

And therefore, generally, *breve domini regis non currit in Wallia*.

[*Breve domini regis de latitat non currit in Wallia*. Argued in *Lampley v. Thomas*, and adjudged in *Jones v. Jones*, H. 21 G. 2. 1 *Wils.* 193. *Doug.* 213. *contra.*]

An original writ in real actions does not run in *Wales*. *Vau.* 417.

And

And tho' real actions for a feignory, lands, church, &c. in the *marches of Wales*, were brought and tried in an adjoining county before the *st.* 27 H. 8. 26. yet since that statute they are not used. *Vau.* 417. *Vide post.* (D).

So, an appeal does not lie in the county next to *Wales* for a murder committed in *Wales*. *R. Cro. Car.* 247.

So, an indictment in *Wales* for felony in the same county shall not be removed by *certiorari* to be tried in the county adjoining. *Dub. Cro. Car.* 248. 331, 2. *Semb.* 2 *Mod. Ca.* 137. 140. *Vide ante*, (B 1.)

[So, civil proceedings shall not be removed by *certiorari* from the courts of great sessions, without *special cause*. *Doug.* 751. n.]

So, a person indicted for murder in *Wales* may be removed by *habeas corpus*, and tried in the next *English* county. *Vide post.* (D).

So, judicial process, as a *capias ad satisfaciendum*, or *fieri facias*, upon a judgment, does not go to a *sheriff* of *Wales*. *R. in C. B. Godb.* 214. *R. cont. per three J.* 2 *Mod.* 10. *Acc. Vau.* 397. 417.

Tho' it be upon a judgment in *B. R.* *R. cont. in B. R.* 2 *Bul.* 156, 7. *Per Dod.* 2 *Cro.* 484. *Semb. cont. per three J. but Twissd. acc. and therefore nothing done.* 2 *Sand.* 193. 1 *Lev.* 291.

Nor, a *scire facias* upon a judgment against an heir and *tertenants*. *R. cont. per three J.* 2 *Mod.* 10. *but Vau. acc.* 397. 417.

Nor, a *scire facias* against bail, who live in *Wales*. *R. cont. in B. R.* 2 *Bul.* 54.

Nor, a *testatum scire facias*. *Dub.* 1 *Lev.* 291.

So, if the defendant dies after judgment against him in *Wales*, and *A.* takes administration to him in *London*, the judgment in *Wales* shall not be removed by *certiorari* to *B. R.* or *C. B.* to enable the plaintiff to take a *scire facias* out of the superior court against the administrator. *R. Cro. Car.* 34.

(D) Trials for Lands, &c. in *Wales*.

REAL actions for a feignory or barony within the *marches of Wales*, shall be brought and tried in the county within *England* next to such feignory or barony. *Vau.* 412. *Vide Action*, (N 2.)

And this seems founded upon an ancient statute now lost. *Vau.* 404.

So, by the *st.* 26 H. 8. 6. justices of peace and gaol delivery in counties adjoining to *Wales* may hear, &c. all felonies (and their accessories) committed in *Wales*.

And this is not repealed by the *st.* 34 & 35 H. 8. 26. that judges of *Wales* may hold pleas of the crown, and shall inquire, &c. of all criminal offences committed within their limits; for the king has a concurrent jurisdiction. 2 *Mo. Ca.* 145.

And therefore, a person indicted there for murder, after a *nolle prosequi* upon the indictment there, was removed by *habeas corpus* to *Hereford*, and there indicted, and tried and convicted, and after judgment against him in *B. R.* executed. *R.* 2 *Mod. Ca.* 136—145.

[Judges of assize in adjacent *English* county have concurrent jurisdiction in felonies, with the grand sessions, thro' all *Wales*, and not in the lordships marchers only. *Ren v. Athoe*, T. 9 G. Str. 553.]

[*Habeas corpus* may be granted, without affidavit, to remove a prisoner indicted, to take his trial in the adjacent *English* county. *Ren v. Davis*, H. 6 G. 2. Str. 945.]

But

But trial in the next county for lands in *Wales* extends only to a feigniory or barony within the *marches* there. *Vau.* 412.

It does not extend to an indictment or appeal for murder or other felony there, which shall be tried in the *grand sessions*. *R. Jon.* 255.

After issue joined a *venire facias* shall be awarded for trial.

And it may be returnable the day after the *teste*; for the process shall be *de die in diem* in the same sessions. *R. Cro. Car.* 179.

[If there be a bill of exceptions to the rejection of evidence in the court of *great sessions* in *Wales*, and on error in *B. R.* the evidence be deemed admissible, the court of *B. R.* will award a *venire de novo* into the next *English* county. *2 Term Rep.* 125.]

If there be a bill in the *grand sessions* against *A.* and *B.* to which *A.* who lives there appears, if *B.* upon service in *London* does not appear, his land in *Wales* may be sequestred. *Dub.* *2 Mod. Ca.* 374.

[By *stat.* 13 *Geo.* 3. *c.* 51. if plaintiff in personal or in transitory action, where the cause arises in *Wales*, and is tried in the next *English* county, does not recover by verdict, debt or damages to 10*l.*, and judge certifies that defendant resided in *Wales*, at service of mesne process, judgment of nonsuit shall be entered, unless judge certifies that the title of land was chiefly in question, and the cause proper to be tried in *English* county. Plaintiff is to have his damages out of defendant's costs; the verdict is a bar to other actions for the same.]

[If plaintiff, an attorney, by attachment of privilege, sue a defendant resident in *Wales*, for words spoken there, and lay the venue in the *Welch* county, (in order that the cause may be tried in the next *English* county,) and the judge at the trial certify that the defendant was resident in *Wales*, &c. that fact, thus certified, may be suggested on the judgment roll in order to entitle the defendant under this statute to enter a judgment of nonsuit. *Evans v. Jones, B. R. M.* 36 *G.* 3. 6 *T. R.* 500.]

[Justices shall not make deputies but for calling courts, taking fines, &c.]

[King may nominate deputy, in case of sickness of justice.]

[There may be special juries.]

[Justices may appoint persons to take affidavits, and recognizances.]

[The ground of a judgment in one of the courts of *great sessions* may be questioned in an action on that judgment. *Doug.* 6.]

Vide more concerning *Wales* in *Action*, (N 2.)

W A R.

(A) War.

THE king has power to make war and peace. *Vide in Prerogative*, (C 1.)

How soldiers are to be levied for the land or sea service, *vide in Prerogative*, (C 2.)

Command of the forces. *Vide Prerogative*, (C 3.)

Erection or raising of forts. *Vide Prerogative*, (C 4.)

After war declared a proclamation issues to notify it.

(B) Service of the King in his War.

(B 1.) By Tenure.

MAVULT *principes* to be served by his own subjects, rather than by others, in his wars. *Co. L. 69. a.*

By the *§. 7 Ed. 1.* it belongs to the king to defend all force, &c. and the earls, barons, &c. are bound to aid their sovereign at all seasons, if need be.

If the king makes a voyage royal into *Scotland*, &c. whosoever holds *per feodum militare* ought to be with the king well arrayed for the war for forty days, and so *pro rata*, if he holds by a moiety, &c. of a knight's fee. *Lit. f. 95.*

And a knight's fee was computed not by the quantity, but by the value of his land; for *20l. per annum* was a knight's fee. *Co. L. 69. a.*

(B 2.) By Contract.

So, the king by indenture inrolled in the *Exchequer* may contract with a knight, &c. who has tenants, &c. in the country for so many men for such a time to serve the king in his wars. *Co. L. 71. a.*

And the departure of a soldier after muster, &c. was felony by the *§. 18 H. 6. 19.* (which is now of no force, because such form of *militia* is disused), *Co. L. 71. a. R. 6 Co. 27. a. Vide Justices, (S 8.)*

(B 3.) By Commission of Array.

So, the king may issue a commission of array, to raise soldiers pursuant to the direction *5 H. 4. Semb. 2 Rusb. 1229—1233.*

(B 4.) What Arms every one may keep.

So, by the *§. Wint. 13. Ed. 1. 6.* every man shall have in his house harness to keep the peace according to the ancient assise, viz. he that hath under *40s. per annum*, gisarms, knives, and less weapons; and he that hath under *40 marks*, in goods, swords, knives, and less weapons; he that hath above *40s.* and under *5l. per annum*, a sword, bow and arrows, and a knife; if above *5l. per annum*, a doublet, iron breast-plate, sword and knife; he that hath *10l. per annum*, and *20 marks* in goods, an *hauberge*, iron breast-plate, sword, and knife; he that hath above *15l. per annum*, and *40 marks*, an horse, besides the *hauberge*, &c.

And by this statute a view of armour shall be by two constables twice a year.

By this statute and the articles of inquisition thereon *34 Ed. 1.* inquiry shall be made, if the people have weapons in their houses according to the quantity of their lands and goods.

But by the *§. 1 Ed. 3. 5.* none shall be charged to arm himself, otherwise than he was wont to be.

(B 5.) Remedy against a Deforter.

By the common law, if a soldier, after receiving the king's wages, departs from the service, upon a certificate by the captain to Chancery, a writ goes to the king's serjeant at arms *ad capiend. conduct.*, &c. *2 Inst. 53.*

[The

[The receiving pay as a soldier, subjects the receiver to military jurisdiction. *Grant v. Gould*, C. P. T. 32 Geo. 3. 2 H. Bl. 69.]

Or, a writ to the sheriff, *ad arrestandum B. qui pecuniam recepit ad proficiscendum in obsequium domini regis, et non est profectus*. 2 Inst. 53.

(B 6.) But the King cannot charge the Subject for the levying of Forces without Authority of Parliament.

But by the *st.* 1 *Ed.* 3. 7. confirmed by the *st.* 4 *H.* 4. 13. whereas commissions were granted to levy men of arms, and convey them to the king at the charge of the shire, *it was enacted*, it shall be done so no more. *Vide Parliament*, (H 22.)

And 20 *Ed.* 3. the king confirmed the ordinance, that the subject shall not be charged for arms. 2 *Rol.* 173. l. 4.

By the *st.* 25 *Ed.* 3. 8. no man shall be compelled to find men of arms, &c. if it be not by common consent in parliament, unless they hold by such service. *Confirmed by* 4 *H.* 4. 13.

(B 7.) Nor, for Maintenance of the Forces.

So, by the *st.* 3 *Car.* (being a petition of right) *it was complained* that soldiers and mariners in divers counties have been dispersed, and the inhabitants against their wills compelled to receive them into their houses, and to suffer them to sojourn there, *and it was prayed*, that the people may not be so burthened in time to come; to which the king answered, *soit droit fait come est desire*.

By the *st.* 1 *Ed.* 3. 7. no commissions shall be awarded to prepare men of arms, and convey them to the king in *Scotland*, or elsewhere, at the charge of the shires.

By the *st.* 18 *Ed.* 3. 7. men of arms, &c. chosen to go in the king's service out of *England* shall be at the king's wages from the day they depart out of their counties till they return.

So, by the *st.* 1 *Ed.* 3. 5. none shall be compelled to go out of his shire, but on necessity, and sudden coming of strange enemies, and then but as usual.

Vide more concerning War in Discent, (D 6.)—*Justices*, (K 4.)—*Officer*, (K 4.)—*Prærogative*, (C 1, &c.)

W A R D.

Vide Guardian, (H 1, &c.)—*Prærogative*, (D 59.)

W A R D E N.

— of the Cinque Ports.

Vide Franchises, (E 3.)

— of the Fleet.

Vide Chancery, (B 8.)

W A R D M O T E.

Vide Courts, (O 6.)

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WARRANT.

Vide Forcible Entry, (D 18, 19.)—*Imprisonment*, (H 6, &c.)—*Pleader*, (3 K 26.)—(3 M 23.)

WARRANT OF ATTORNEY.

[THE rule which requires that an attorney on the part of a prisoner should be present when a bond and warrant of attorney are executed by him, only relates to persons in custody on *mesne process*. 1 Term Rep. 715.]

Vide Amendment, (E 1, 2.)—*Attorney*, (B 7, 8.)

WARRANTY.

Vide Garranty.

Warrantia Chartæ.

Vide Garranty, (K 1.)—*Pleader*, (3 N 1, &c.)

WARRÉN.

Vide Chase (D—F).

WAST.

(A) Wast, by the Common Law.

(A 1.) Prohibition of Wast.

BY the common law a prohibition might be awarded against a tenant in dower, or guardian in *chivalry*, for prevention of wast by them. 2 Inst. 299.

So, against tenant by the *curtesy*. Cont. 2 Inst. 145.

And such prohibition lay *quia timet*, before wast committed.

So, if a writ of right or other action is brought, and *pendente lite* the tenant commits wast, a writ of *estrepement* shall go. R. Dal. 1.

So, if error be to reverse a common recovery. R. Cro. El. 774.

So, a prohibition of wast lay by the patron against the parson, vicar, to prevent wast in the glebe or church-yard.

And the *st.* 35 Ed. 1. *ne rector prosternat arbores incameterio* was only affirmance of the common law. R. 11 Co. 49. b.

So, it lay against a bishop, abbot, prebend, &c.

So, if the incumbent commits wast in the glebe or lands of the rectory *pendente lite* in *quare impedit*, a prohibition shall be granted. R. Hob. 36.

So, since the *st.* of Marl. 24. it lies against a lessee for life, or for years. 2 Inst. 146.

So,

So, a prohibition lies now, since the *st. of Gloucester*, 5. where it would lie at common law. 2 *Inst.* 299.

Prohibition of waft was by a writ directed to the sheriff commanding him, *quod non permittat quod A. faciat vestum*, &c. 2 *Inst.* 299.

And thereupon the sheriff might take the *posse comitatus*, and prevent waft. 2 *Inst.* 299.

But now, by the *st. W.* 2. 14. it is ordained, that no writ of prohibition shall be awarded for the future, but a writ of summons. 2 *Inst.* 146. 389.

(A 2.) Action of Waft.

So, by the common law, after waft committed, an action lies against tenant in dower, or guardian in *chivalry*.

So, against tenant by the *curtesy*. 2 *Inst.* 145. 300.

And it lay against all tenants in dower, by the common law, or by custom, *ad osium ecclesie, ex assensu patris*, or *de la plus belle*. 2 *Inst.* 303.

So, against a guardian in right or in deed. 2 *Inst.* 305.

By grant of a subject, or of the king. 2 *Inst.* 305.

So, against a guardian in *socage*, as well as in *chivalry*. 2 *Inst.* 135. 305. *F. N. B.* 59. *E. Cent. Co. L.* 54. *a.*

But by the common law, waft did not lie against lessee for life or for years; for it was the *laches* of the lessor, that he did not provide against waft. 2 *Inst.* 299. 145. 5 *Co.* 13. *b.*

So, it does not lie by the assignee of the heir against tenant by *curtesy*, or in dower. 2 *Inst.* 301.

But waft does not lie in *ancient demesne*, because the court upon default at the grand distress cannot make a writ to the sheriff to go to the place wasted, according to the *st. W.* 2. 14. 2 *Sand.* 254.

(B) Waft, by the Custom of London.

(B 1.) Waft lies.

SO, by the custom of London waft lies at the common law for waft in houses there. 2 *Inst.* 299.

And now, since the *st. of Glo.* 5. waft lies there in cases within that statute as well as in others; for tho' the statute gives an action for waft in cases where it did not lie before, and gives also treble damages *et locum vastatum*, yet it does not take away the jurisdiction of any court which before held plea of waft. 2 *Inst.* 299. *R.* 2 *Sand.* 254.

(B 2.) And Writ of *Estrepement*.

So, a writ of *estrepement* lies in London, *pendente placito*, or after judgment and before execution, to stay waft. 2 *Inst.* 328.

And it may be by original writ, sued out of *Chancery* with the original in the suit, or after *pendente placito*, or judicial, granted by the court, and directed to the sheriff, the party, or both. 2 *Inst.* 328.

And this was explained by the *st. of Glo.* 13. which enacts, that if a plea be moved in London by writ, the tenant shall not commit waft or *estrepement* of the tenement demanded; and if he do, the mayor and bailiffs shall cause it to be kept at the suit of the demandant.

And now by the *st. Glo.* 13. it lies to prevent waft *pendente placito*, and it judicially issues out of the court where the action is depending. 2 *Inst.* 328. So,

So, *estrepement* lies in all real actions where damages are recovered.
 2 *Inst.* 328.

So, in real actions, tho' no damages are to be recovered. *Semb.*
 2 *Inst.* 328.

And against every tenant.

So, against his feoffee, vouchee, *pryce* in aid. 2 *Inst.* 328.

So, against the tenant and a stranger. *Ibid.*

So, it lies in *scire facias* upon a fine and recovery, *quid juris clamat*, attain, tho' no land is demanded. *Ibid.*

And if the land *escheats pendente placito*, the writ of *estrepement* extends to it. 2 *Inst.* 329.

In *estrepement* the tenant shall not have his age; for it is in nature of a trespass. 2 *Inst.* 328.

After *estrepement* delivered to the sheriff, he may resist him who attempts waft, and take the *posse comitatus*, and imprison him, if necessary. 2 *Inst.* 329.

Such writ is only a prohibition from committing waft, and the parties may plead upon the attachment. *Ibid.*

By virtue of this writ the plaintiff recovers damages for the waft committed *pendente placito*. *Ibid.*

So, upon *estrepement* after judgment, tho' no prohibition before delivered. *Ibid.*

But in *estrepement pendente placito*, the plaintiff does not recover damages till the principal suit is determined. 2 *Inst.* 328.

Nor, damages for waft committed by a stranger *pendente placito*, without the privity of the tenant. *Ibid.*

In waft the plaintiff does not recover damages for the waft *pendente placito*, but the plaintiff must have a writ of *estrepement*. 2 *Inst.* 329.

If the defendant commits waft after a writ of *estrepement*, the plaintiff may declare on the writ of *estrepement*. *Mo.* 100.

To the declaration in a writ of *estrepement*, the defendant may plead *no waft committed*. *Ibid.*

If it be found by verdict in a writ of *estrepement*, that the defendant has committed waft, the plaintiff shall have judgment, and recover damages and costs. *Ibid.*

(C 1.) Waft, by the Statute of *Glouc.* 5.

AND now by the *st.* 6 *Ed.* 1. 5. a man may have a writ of waft in *Chancery* against a man, who holds by the law of *England*, or in other manner, for term of life, or years, or in dower; and he who shall be attainted of waft, shall lose the thing which he has wasted, and make satisfaction of treble of what the waft shall be taxed at.

And by *st.* *W.* 2. 13 *Ed.* 1. 14. prohibition of waft is taken away, and a writ of summons given for all waft.

By the *st.* of *Marlb.* 52 *H.* 3. 23. all farmers were prohibited to commit waft, and this was the first statute against them. 2 *Inst.* 145.

And therefore, since this statute, if the lessee for life or for years had committed voluntary or permissive waft, he should answer full damages. 2 *Inst.* 145. *Vide post.* (F 2.)

By the *st.* *W.* 2. 13 *Ed.* 1. 22. if there are joint-tenants or tenants in common, and one commits waft, the other may have a writ of waft, whereupon the defendant shall have his election to have partition and

take *locum vestatum* for his share, or to find surety that he will not take more than his proportion. 2 *Inst.* 403. *Co. L.* 200. b.

And this extends to joint-tenants, &c. only for life. 2 *Inst.* 402, *Co.* 200. b.

But it does not extend to waft in cattle, house, or other place for habitation. 2 *Inst.* 402.

Nor, to waft in a dovehouse. *Co. L.* 200. b.

Nor, to waft by one parcener. *Ibid.*

(C 2.) By whom it lies.

Waft is always supposed, to the disherison of the plaintiff, and therefore it shall be brought by him who has the immediate reversion, or remainder, in fee, or in tail. *Co. L.* 53. a.

A man who claims the inheritance by purchase, may have waft, as well as if he claimed by descent, tho' the statute speaks only of inheritors. 2 *Rol.* 825. l. 44.

So, he who claims in remainder. 2 *Rol.* 825. l. 25.

So, a lord, who has the inheritance by *escheat*. 2 *Rol.* 825. l. 30.

The grantee of the king upon attainder. *Co. Ent.* 699. a.

So, he in reversion or remainder in tail, as well as in fee. 2 *Rol.* 825. l. 25. *Hut.* 110. 2 *Inst.* 302.

So, if tenant in common leases for years his part to his companion, he may have waft, and recover a moiety of the place wafted and of the damages. *Per two J. Mo.* 71.

So, he who has the inheritance may join another with him, who has not an estate of inheritance, in an action for waft; as, husband and wife may have waft, where the reversion or remainder is to them and the heirs of the husband. 2 *Rol.* 825. l. 41.

So, if the reversion be granted to A. and B. and the heirs of B., they may join. *Co. L.* 53. b.

So, a surviving parcener, and the husband of another parcener, being tenant by the *curtesy*, may join in waft. *Co. L.* 53. b. *Dub. per Treby, Lut.* 803.

So, two joint-tenants for life, and to the heirs of one, may join. *Co. L.* 53. b. 42. a.

So, it is sufficient, if the plaintiff has the immediate inheritance at the time of the action, tho' he had not at the time of the waft, or will not have by possibility after; as, if tenant for life or years, remainder for life, &c. commits waft, and afterwards B. in remainder dies, or surrenders, the reversioner shall maintain waft. *Co. L.* 54. a. 2 *Rol.* 829. l. 10. 25. *Mo.* 387. *R.* 5 *Co.* 76. *Jon.* 51. *All.* 82.

So, if a lease for life or years was made to A. remainder to A. *per auter vie*; for both estates are in the lessee. 2 *Inst.* 301.

So, if the *mesne* remainder or reversion for life was without impeachment of waft. *R.* *Jon.* 51. 2 *Cro.* 688.

So, if the remainder for life be upon a contingency, before the contingency happens, the reversioner may have waft. *R.* *Al.* 82.

Or, if there are contingent remainders or uses, before they come in *esse*. *R.* *Al.* 83.

So, if the remainder be only for years, the reversioner shall have waft, notwithstanding the *mesne* remainder. *Co. L.* 54. a. 2 *Inst.* 301. So,

So, if a lease be made by him in reversion to commence at a future day; for this is only a future interest. *Co. L. 54. a. 2 Rol. 829. l. 30.*

(C 3.) By whom not.

But waft does not lie by him who has not the immediate inheritance in him; and therefore, if a lease be to *A.* for life or years, remainder to *B.* for life, waft does not lie by him in fee, so long as the estate of *B.* continues. *Co. L. 54. a. R. Al. 81. 2 Rol. 829. l. 10. 25. Per two J. Mo. 18. R. 2 Cro. 688. 2 Inst. 301.*

So, if a lease be to *A.* for life or years, and he in reversion grants the reversion for life to *B.* during the continuance of the estate of *B.*, he shall not have waft.

So, if he grants the reversion for years, he shall not have waft during the term. *Co. L. 54. a.*

So, if tenant in tail by fine grants, or bargains and sells *totum statum suum*, the grantee shall not have waft; for he has no inheritance. *R. 3 Leo. 60. Vide Estate, (B 33.)*

Tho' he is tenant in tail, with remainder in fee; for, tho' the grantee has the fee, there is a *mesne* estate-tail. *R. 3 Leo. 60.*

So, waft does not lie by tenant in tail after possibility. *2 Rol. 825. l. 31.*

Tho' waft was committed before the death of husband, or wife, upon whom the issue were to be begotten. *Mo. 18.*

So, if there be tenant for life, remainder to husband and wife in special tail, remainder to the heirs of the husband, and the wife dies without issue, the husband shall not have waft. *Dub. Mo. 18.*

So, waft does not lie by him, who had not the inheritance in him at the time of the waft done; and therefore it does not lie by an heir for waft in the time of his ancestor. *2 Inst. 305.*

Nor, the successor of a sole corporation; as, bishop, archdeacon, parson, &c. for waft in the time of the predecessor. *2 Rol. 824. l. 43. 49. R. 1 Rol. 432.*

Nor, a younger son, for waft in the time of his elder brother, who died before actual seisin, whereby he makes his title as heir to his father. *2 Rol. 825. l. 10.*

Nor, grantee of a reversion for waft before his grant.

Or, after the grant of the reversion, and before attornment. *2 Rol. 825. l. 15.*

Nor, the grantor, for waft after grant of the reversion, and before attornment. *2 Rol. 825. l. 15.*

Nor, a lord by escheat, for waft before the escheat. *2 Rol. 825. l. 6.*

Yet waft lies by the surviving joint-tenant, for waft in the life of his companion.

And by a surviving *parcener*, for waft in her sister's time. *2 Inst. 305.*

So, waft does not lie by him, who has not the same estate continuing in him, which he had at the time of the waft committed; as, if a reversioner, after waft committed, aliens, and retakes an estate to himself and his heirs, he cannot afterwards have waft, which consists in privacy. *Co. L. 53. b.*

So, if he grants the reversion to the use of him and his wife and the heirs of himself. *Co. L. 53. b.*

(C 4.) Against whom it lies.

Wast by the common law was only against tenant by the *curtesy*, in dower, or guardian. *Vide ante, (A 2.)*

And now, by the *st. of Glo. 5.* it lies also against lessee for life, or years. *Per auter vie, quamdiu se bene gesserit, &c. 2 Inst. 301.*

But it is usually brought upon the statute against the tenant by the *curtesy. F. N. B. 60. K.*

So, it lies against a devisee for life, or for years. *2 Rol. 826. l. 25.*

So, if the estate for life or years be forfeited to the king for treason, &c. wast lies against the king's grantee, tho' he comes in the *post. Per Co. 2 Rol. 826. l. 20. 2 Rol. 20.*

If tenant for life or for years assigns his estate, wast lies against the assignee for wast done after the assignment. *Co. L. 54. a. R. Cro. El. 683.*

So, if lessee makes an underlease to *B.* who commits wast, an action lies against him.

If tenant by *curtesy* or in dower assigns his estate, and the heir before or after the assignment grants his reversion, the grantee shall have wast against the assignee for wast afterwards committed; for the priority is gone. *Co. L. 54. a. 2 Inst. 301.*

If tenant in tail after possibility assigns his estate, wast lies against him. *2 Inst. 302.*

If tenant by the *curtesy* makes a lease for years, and the reversioner confirms it, and tenant by the *curtesy* dies, wast lies against the lessee for years. *2 Inst. 302.*

So, if tenant for life or years assigns, excepting the trees, and the assignee cuts them down, wast lies against him. *2 Inst. 302. 2 Rol. 454. l. 40.*

So, if a lord enters upon his *villain*, wast lies against him for wast afterwards, tho' he comes in in the *post. Co. L. 451. a. 2 Inst. 301.*

So, it lies against an occupant. *Co. L. 54. a. 2 Inst. 301.*

Tho' he takes, as special occupant. *Co. L. 54. a.*

So, against him, who takes a term, as executor, or administrator. *2 Inst. 302. Co. Ent. 693, 694.*

So, against an executor *de son tort* of a term. *R. 3 Mod. 93.*

Wast shall be brought, generally, against him who commits the wast. *Co. L. 54.*

And therefore, if lessee for life or for years commits wast, and afterwards assigns his estate to another, wast lies against him in the *tenet. 2 Rol. 829. l. 45. 2 Inst. 302.*

So, if a guardian commits wast, and afterwards grants over his *ward. 2 Rol. 829. l. 50. Cont. Co. L. 54.*

So, if grantee of a tenant for life or years upon condition commits wast, and afterwards the lessee enters for the condition broken. *Co. L. 54. a. 2 Inst. 302.*

So, it lies against tenant *per auter vie*, or for years, in the *tenuit* after the death of the *cestui que vie*, or the term expired. *2 Rol. 830. l. 8. 14.*

So, against an executor, who commits wast, and then assents to a devise of the term. *5 Co 12. b.*

So,

So, against a successor, for wast by his predecessor deposed, *quandiu* he is alive. 2 *Rol.* 827. l. 40. 43.

So, against a husband, who has a term as survivor, for wast during the coverture. *Co. L.* 54. a.

But the action shall be against tenant by the *curtesy*, in dower, for life or for years, tho' wast be committed by a stranger. *Co. L.* 54. a.

2 *Inst.* 146. 2 *Rol.* 821. l. 5.

Tho' the lessee be an infant, *feme-covert*, &c. *Co. L.* 54. a.

2 *Inst.* 303.

Tho' a stranger disseises the lessee, and commits wast. 2 *Rol.* 821.

l. 10. *D.* 1 *Leo.* 264.

Tho' the lessee enfeoffs a stranger upon condition, who commits wast, and afterwards the lessee enters for the condition broken.

2 *Rol.* 828. l. 25.

Tho' the wast was for cutting down timber upon a contract with tenant in tail in his lifetime. *R. Hard.* 96.

So, if *B.* has common of *estovers* in a wood demised, and in taking his *estovers* he commits wast, an action lies against the lessee; for *B.* was a stranger for this purpose. 2 *Rol.* 821. l. 15.

So, if a monk commits wast, where his sovereign is guardian.

2 *Rol.* 821. l. 30.

If tenant in dower be of a manor, and a copyholder commits wast.

2 *Inst.* 303.

So, if tenant, by *curtesy*, or in dower, assigns his estate to *B.* who commits wast, an action lies by the heir against the tenant by *curtesy*, or in dower; for there is a privity between them. *Co. L.* 54. a.

And it must be against them, and not against the assignee.

2 *Inst.* 301.

So, by the *st.* 11 *H.* 6. 5. wast lies against the *pernor* of the profits, tho' he has assigned his estate. 2 *Inst.* 302.

And tho' there be an assignment by the assignee, it lies against the assignee who took the profits. *R.* 5 *Co.* 77. b.

And by him in remainder, as well as by him in reversion. *R.* 5 *Co.* 77. b.

So, if there be joint-tenants of an estate for life or years, and one commits wast, an action lies against both; but the treble damages shall be recovered only against him who committed the wast.

2 *Inst.* 302.

So, if they are joint-tenants of a ward, and one commits wast. *Co. L.* 54. a.

If one joint-tenant enters into religion, wast lies against his companion alone. 2 *Rol.* 828. l. 38.

So, wast lies against husband and wife for wast committed by the wife before coverture. 2 *Rol.* 827. l. 20.

Or, for wast committed during coverture, when the husband is seised or possessed in right of his wife, or jointly with his wife. 2 *Rol.* 827. l. 5. 16. 18. *Cro. El.* 357.

(C 5.) Against whom not.

But if the king, tenant for life or years, commits wast, an action does not lie against him; for the king is not within the *st.* of *Glo.* 5.

And therefore, if an estate for life or years be forfeited to the king for treason, &c. wast does not lie against the king. *Ma.* 335.

If

If tenant by *curtesy*, or in dower, or for life, dies after waſt committed, waſt does not lie againſt his executor or adminiſtrator. *2 Rol. 828. l. 34.*

So, if leſſee for years dies after waſt committed, tho' the term goes to his executor or adminiſtrator. *2 Inſt. 302.*

So, if an abbot, &c. guardian, commits waſt and dies, waſt does not lie againſt his ſucceſſor. *2 Rol. 827. l. 40.*

If a woman, tenant in dower, takes huſband, who commits waſt, and then the wife dies, waſt does not lie againſt the huſband. *2 Rol. 827. l. 22.*

So, if the wife was tenant for life; for the huſband was ſeiſed *in jure uxoris*. *Co. 54. a. 2 Inſt. 301. Semb. Cro. El. 357.*

So, waſt does not lie againſt a guardian in *ſocage*; for he may have account. *Co. L. 54. a. Cont. 2 Inſt. 135. 305. Vide ante, (A 2.)*

Nor, againſt tenant by ſtatute-merchant, ſtaple, recognizance, or *elegit*; for the conuſor may have a *venire facias ad computandum*, and *recoupe* in damages. *Co. L. 54. a. 2 Inſt. 302.*

Nor, againſt tenant in tail after poſſibility. *Co. L. 54. 2 Inſt. 302.*

Nor, againſt leſſee at will. *5 Co. 13. b. Cro. El. 777. 784.*

So, waſt does not lie againſt tenant for life or years without impeachment of waſt.

So, if tenant for life, without impeachment, leaſes for years, waſt does not lie againſt the leſſee for years; for his eſtate is derived from him, who was diſpunishable. *R. Jon. 51.*

So, if a leaſe for life or years be without impeachment of waſt for two years, waſt does not lie after the two years expired for waſt during thoſe years. *Mo. 18.*

(D 1.) Waſt, what ſhall be.

WAſT, deſtruction, and exile of *villeins*, are all prohibited. *Co. L. 53. b.*

So, *waſt* contains alſo *exile*; for tho' the *ſt. of Marl. 23.* ſpeaks of waſt, ſale, and exile, yet the *ſt. of M. c. 4. W. 2. 14.* and the *ſt. of Glo. 5.* mention only waſt and deſtruction, and exile is comprehended under the general word *Waſt*. *Co. L. 53. b.*

Waſt is voluntary, or actual waſt, and permiſſive waſt. *Co. L. 53. a.*

(D 2.) In Houſes.

By the *ſt. Marl. 23.* and *ſt. Glo. 5.* it appears that waſt may be done in houſes.

And therefore, if the leſſee, &c. pull down the houſes demiſed, it will be waſt. *Co. L. 53. a.*

So, if he ſuffers a houſe to be uncovered, whereby the timber decays. *Co. L. 53. a.*

Tho' the timber be not thereby thrown down. *2 Rol. 815. l. 31.*

So, if the houſe was uncovered at the commencement of the leaſe; yet it will be waſt, if the leſſee pulls it down. *Co. L. 53. a.*

Or, if it was ruinous at the commencement, and he ſuffers it to be more ruinous. *2 Rol. 818. l. 2.*

So, if the leſſee ſuffers *ſtatuuncula ante oſtium* to be uncovered, whereby

whereby the timber thereof becomes rotten, it will be wast. *R. 2 Rol. 814. l. 25.*

Or, glass windows to be broke, or cartied away. *Co. L. 53. a. R. 4 Co. 63. b.*

Or, the wainscot, benches, doors, furnaces; &c. fixed to the house. *Co. L. 53. a.*

Tho' they are fixed by the lessee himself by nails, screws, or otherwise. *R. 4 Co. 64. a. R. Mo. 177. Cont. per Dod. 1 Rol. 216.*

So, if he permits the walls of a house to be decayed for want of plastering, whereby the timber is rotted. *R. 2 Rol. 816. l. 50.*

Or, the chambers of the house. *R. 2 Rol. 816. l. 45.*

Tho' the timber be not thereby rotted. *Semb. 2 Rol. 817. l. 1.*

So, if he does not scour a mote, &c. whereby the groundfel, &c. is decayed. *R. Ow. 43.*

So, it will be wast, if the walls are suffered to be decayed, tho' the timber was in decay at the commencement of the lease. *2 Rol. 817. l. 53.*

If he suffers the house to be burned by neglect or mischance. *Co. L. 53. b. 2 Rol. 820. l. 42.*

So, it will be wast, tho' there be no timber upon the land demised for repairs. *Co. L. 53. a.*

Tho' the house was uncovered, &c. by tempest, if it be suffered afterwards to remain in decay. *Co. L. 53. a. Per two J. Mo. 62. 2 Rol. 818. l. 2.*

So, it will be wast, if the lessee pulls down the house, and rebuilds it less than before. *2 Rol. 815. l. 33.*

So, if he rebuilds it larger, to the prejudice of the lessor; for it is more charge to repair. *2 Rol. 815. l. 35.*

So, if the lessee builds a new house, where there was none before. *Co. L. 53. a. Per two J. 2 Rol. 815. l. 45. Cont. per Wood, Kel. 38.;* for it will be for the lessor's profit, and if not, he may throw it down. *D. cont. Hob. 234.*

So, if he alters the house to the lessor's prejudice; as, if he converts a parlour into a stable. *Per Vavasor, Kel. 39. 2 Rol. 815. l. 31.*

Or, changes a corn mill to a fulling mill. *Per two J. 2 Rol. 814. l. 46. D. 2 Cro. 182.*

Or, to a horse mill, tho' it be for the lessor's advantage. *2 Cro. 182.*

If he turns two rooms into one; for it would be for the lessor's advantage, it may be shewn on the other side. *R. Kel. 38. 2 Rol. 815. l. 37.*

So, if he converts a brewhouse of 120 *l. per annum* into tenements of 200 *l. per annum*. *R. 1 Lev. 309. 311. 1 Mod. 94.*

So, if he builds a new house, and afterwards suffers that to be decayed. *Adm. 42 Ed. 3. 21. b. Co. L. 53. a.*

But if the house was uncovered at the commencement of the lease, it is no wast, if the lessee suffers it to be decayed without pulling down. *Co. L. 53. a. R. Ow. 93.*

Or, if the walls were uncovered. *Co. L. 53. a.*

Or, if the house was ruinous, and the lessee suffers it to be as it was, if it is not more ruinous.

So, it is no wast, if the lessee removes furnaces, coppers, or other

utensils of trade, tho' fixed to the freehold during his term. 1 *Sal.* 368. *Semb.* 21 *H.* 7. 27. *a.* *R.* 20 *H.* 7. 13. *b.*

But if it continues till the end of the term, he cannot remove it; for it is given to the reversioner. 1 *Sal.* 368. 21 *H.* 7. 27. *a.* 20 *H.* 7. 13. *b.*

(D 3.) In Gardens, &c.

So, waſt may be committed in a garden or orchard, tho' orchard is not named in the statute. 2 *Roll.* 817. *l.* 33.

As, if leſſee cuts down pear-trees, apple-trees, or other fruit trees. *Co. L.* 53. 2 *Roll.* 817. *l.* 30.

Or, if they are thrown down by tempeſt, and the leſſee afterwards roots them up, or cuts down the *germins* growing, without planting new. 2 *Roll.* 817. *l.* 35.

So, if the leſſee deſtroys, or ſuffers the ſtock of a dove-cote, warren, park, fiſh-pond, pool, &c. to be diminished. *Co. L.* 53. *a.* *R.* 4 *Leo.* 240. 2 *Inſt.* 304. *R.* 2 *Leo.* 222.

Or, throws down the pales of a park or warren. *Ow.* 66.

Or, ſtops up the holes of a dove-cote. *Ibid.*

Or, throws down the banks, &c. of a fiſh-pond, lake, &c. *Ow.* 67.

But if the leſſee deſtroys, &c. it is no waſt, if he leaves a ſufficient ſtock. 2 *Leo.* 222.

(D 4.) In Land, Meadow, &c.

So, it will be waſt, if the leſſee ſuffers the ſea to ſurround arable land, meadow, or paſture. 2 *Roll.* 816. *l.* 40. if it is by his default. *Mo.* 62. 73.

Or, if he ſuffers a wall or bank againſt the ſea, a river, &c. to be ruinous, by which the water ſurrounds a meadow, &c. and renders it uſeleſs. *Co. L.* 53. *b.* *Mo.* 69.

So, if he digs up the ſurface of the land, and carries it away. *R.* 2 *Roll.* 816. *l.* 15.

If the leſſee converts arable to wood, or *è contra*, it will be waſt. *Co. L.* 53. *b.*

Or, meadow to arable. *Co. L.* 53. *b.* *Mo.* 101. 2 *Roll.* 815. *l.* 4. 814. *l.* 50.

Or, paſture. 2 *Roll.* 814. *l.* 50. 1 *Ch. Rep.* 106. 116.

Or, meadow to orchard, hop-garden; tho' it be melioration. 2 *Leo.* 174.

Or, converts a hop-garden to tillage. *Ow.* 67.

If leſſee for life or years opens new mines in land demiſed, without mention of mines, it will be waſt. *Co. L.* 53. *b.* *R.* 5 *Co.* 12. *R.* 2 *Mod.* 193.

So, if he digs for gravel, lime, clay, brick, earth, ſtone, &c. in pits not open. *Co. L.* 53. *b.* *Mo.* 101.

But it is not waſt, if land, &c. is ſurrounded by the violence of a tempeſt.

So, if paſture be converted to tillage for improvement of the ſoil. 2 *Roll.* 814. *l.* 47.

Or, where it was ſometimes paſture, and ſometimes arable. *Ibid.*

Or, if it was ſtocked with conies, it not being a warren by charter or preſcription. *R.* 2 *Roll.* 815. *l.* 15. 816. *l.* 15.

So,

So, if it was a warren. *R. Ow. 66. Vide ante, (D 3.)*

So, it is no wast, if the land lies fallow, by which means it is over-run with bushes, &c. tho' it is bad husbandry. *2 Rol. 814. l. 35.*

If trenches are dug in a meadow, to draw off the water. *R. 2 Rol. 820. l. 23. 2 Leo. 174.*

If woad be sown against the end of the term, tho' it is not ripe for many years. *Semb. 2 Rol. 815. l. 50.*

So, it is not wast to dig for metal, coal, &c. in mines open at the time of the lease. *Co. L. 53. b. R. 5 Co. 12.*

Or, if mines were not demised, if the land was demised with all mines. *R. 5 Co. 12.*

It will not be wast for a parson, vicar, &c. to dig or open mines in his glebe. *Semb. 1 Sid. 152.*

(D 5.) In Wood, &c.

So, it is wast, if a lessee cuts down timber. *Co. L. 53. a.*

Oak, ash, and elm, are timber, after the age of twenty years, throughout the realm. *Co. L. 53. a. Dy. 65. a.*

And where they are scarce, by the custom of the country, beech, willow, hornbeam, &c. may be accounted timber. *Co. L. 53. a. R. Mo. 812.*

And therefore if a lessee cuts down trees, which, by law or the usage of the country, are esteemed timber, it will be wast. *Co. L. 53. a.*

So, if it be found that he cut down black-thorn, *existent. arbores maberemiales*, it will be wast. *R. 2 Rol. 819. l. 52. Cro. Car. 531.*

So, if he cuts down white-thorn, where it is in a large quantity, or made wood. *2 Rol. 817. l. 12. 2 Cro. 126.*

So, if a lessee cuts down young oaks, &c. being of twenty years growth, it will be wast. *2 Rol. 817. l. 28. 819. l. 45.*

Or, destroys the *germins*. *Co. L. 53. a.*

So, if a lessee does an act by which the timber decays; as, if he lops and tops them. *Dy. 65. a. Co. L. 53. a.*

So, if a lessee cuts down birch, willow, maple, &c. which are not timber, if growing in defence of the house. *Co. L. 53. a.*

Or, upon the *scite* of the house. *D. Hob. 219.*

So, if he roots up or destroys quickset of white-thorn, &c. *Co. L. 53. a. R. 2 Cro. 126.*

If he extirpates or destroys the *germins* of underwood, which may be cut. *Co. L. 53. a.*

So, it will be wast, if a lessee cuts down trees for fuel, when there is *lignum aridum* sufficient. *Co. L. 53. b. 2 Rol. 820. l. 10.*

If he cuts down for new pales, fences, &c. where none were before. *Co. L. 53. b.*

Or, for a new house. *2 Rol. 822. l. 35.*

If he sells the trees, and with the money repairs. *Co. L. 53. b.*

Or, afterwards re-purchases, and uses for repairs. *Co. L. 53. b. 2 Rol. 823. l. 15.*

If he cuts down for repairs which are not necessary. *2 Rol. 822. l. 40.*

Or, for repairs, when there shall be occasion. *R. Cro. El. 593.*

Or, for repairs which happened by the lessee's own default. *Co. L. 53. b. 2 Rol. 822. l. 38.*

If

If he cuts down for the use of mines; tho' the lease was with all mines; for he can take only for things directly necessary. *R. 2 Rol. 823. l. 30. Hutt. 19. Hob. 234.*

Tho' the mines were open at the time of the lease, and the lessor and former lessees used to take timber for such use; for the lessor may do as he pleases, and the tort of the former lessee is no excuse. *Per Hob. 235.*

But cutting down trees which are not timber, nor stand for defence of the house, is not wast. *Co. L. 53. a.*

Nor, trees that were timber, when they are dead, *nec fructum nec folia portant.* *Co. L. 53. a. 2 Rol. 814. l. 17.*

So, cutting the underwood of oak, ash, willow, &c. is no wast. *Per two J. 2 Rol. 817. l. 17. 20.*

Tho' it be above twenty years since the last fall. *Semb. 1 Sid. 300.*

So, the cutting down bushes, white-thorn, &c. is no wast. *R. 2 Cro. 126.*

So, cutting down timber for necessary botes, allowed by law to the lessee, is no wast; as, for fuel, plough-bote, hedge-bote, &c. *Co. L. 53. b.*

Or, for repairs. *Ibid.*

For repair of pales, gates, fences, &c. *Ibid.*

Tho' the lessee covenants to repair at his own charge; for this does not take away the liberty which the law allows. *R. Mo. 23.*

So, tho' the lessor covenants to repair. *Co. L. 54. b.*

So, if the lease be without impeachment of wast; yet the lessee may cut down trees for repair, if he pleases. *Co. L. 54. b.*

So, if the house was ruinous at the entry of the lessee, in which case he will not be liable to wast, if it happens. *Co. L. 54. b. 2 Rol. 823. l. 10.*

Or, the decay was in the time of the ancestor of the plaintiff, who is now dispunishable. *2 Rol. 822. l. 45.*

So, if it be for repair of things useful, tho' they are not absolutely necessary; as, for water-troughs to be fixed in the ground for his cattle. *2 Rol. 823. l. 22.*

(E) What shall not be Wast.

(E 1.) In respect of the Value.

BUT the lessee shall not be sued for wast, if the value does not amount to 40 d. *Co. L. 54. a. Noy, 4.*

If it does not amount to more than 40 s. *Wynch, 5.*

And therefore, if wast is found only to the value of 3 s. or less, no judgment shall be given. *2 Rol. 824. l. 10. 15. 25. Noy, 4.*

Tho' the defendant confesses the wast. *Noy, 4. Wynch, 5.*

And if judgment is given, it will be error. *Per And. Noy, 4.*

Yet where the value was to 40 d. it has been allowed for wast. *Co. L. 54. a. Noy, 4.*

And several particulars may be united to make such value. *Co. L. 54. a. 2 Rol. 824. l. 20.*

(E 2.)

(E 2.) If the Place be not demised.

So, waft does not lie, if the place, in which, is no part of the demise; as, if the lessor demises, except the woods, and afterwards the lessee cuts down the woods; for the soil is excepted. *Per two J. Dy. 19. a. Adm. Cro. El. 690.*

But if there be a proviso, that it shall be lawful for the lessor to cut down trees, waft lies, if the lessee cuts down; for it is a covenant, and not an exception. *R. Cro. El. 690. Dy. 19. a. in marg.*

But if a lessee assigns his estate to A., except the woods, and A. cuts down, waft lies against him; for, as to the lessor, they are parcel of the demise. *2 Inst. 302. Dub. Cro. El. 17. R. Cro. El. 683. 1 Leo. 49.*

So, if he assigns, except the mines, and afterwards digs; for the exception is void. *R. Cro. El. 683.*

(E 3.) Or, demised without Impeachment.

So, it does not lie, if the lease be without impeachment of waft. *Mo. 327.*

Sine impedimento vel impeditone vassi, is tantamount to sine impetitione. *2 Inst. 146. 2 Rol. 835. l. 10. Co. Ent. 604. b. 2 Cro. 216.*

But to be without impeachment is a privilege annexed to the estate, and if the estate is changed by confirmation, or otherwise, it is gone. *1 Rol. 183.*

But a grant to a lessee, without impeachment of waft, is not good, if it is not by deed. *2 Inst. 146.*

If it be not by the same deed by which he leases; for, by another deed, it amounts to a covenant. *1 Rol. 183.*

So, if a tenant in tail grants that the lessee shall be without impeachment, it does not bind his issue, tho' he accepts the rent. *Ibid.*

So, a lease, with all trees, timber, sales of wood, &c. is not without impeachment. *R. Hob. 234.*

So, a grant, that the lessee *commodum faciet meliori modo quo sibi videbitur*, &c. does not amount to *without impeachment*. *Hob. 159.*

(E 4.) If done by Default in the Lessor.

So, it does not lie, if the waste be done or occasioned by the lessor himself; as, if trees are cut, &c. by the lessor, or his command. *2 Rol. 822. l. 12.*

If the lessor cuts down, &c. quickset or other fence, by which cattle escape into a wood demised, and destroy the *germins* there. *R. 2 Rol. 822. l. 5.*

If the lessor cuts down trees, and afterwards the lessee's cattle destroy the *germins* of them. *Per two J. Mo. 9.*

If the lessor does not allow gross timber, when there is not sufficient upon the land, and the decay is not by default of the lessee. *Simb. per two J. Mo. 7.*

So, it does not lie, if the lessor accepts a surrender from the lessee, after the waste. *2 Inst. 304.*

(E 5.)

(E 5.) Or, by Tempest or Enemies.

So, it does not lie, if the wast was by tempest, lightning, &c. if it be repaired in convenient time. *Co. L. 53. a. 10 Co. 139. b.*
Or, by the king's enemies. *Co. L. 53. a. 2 Inst. 303.*

(F) Penalty for Wast.

(F 1.) Done by Guardian in Chivalry.

BY the *ft. M. Ch. 9 H. 3. 4. custos terra, &c. capiat nisi rationabiliter exit, &c. et hoc sine destructione est vasto hominum et rerum. Et si nos commiserimus custodiam, &c. Nos ab eo capiemus emendas, &c. Si dederimus, &c. Custodiam et ille destructionem fecerit aut vastum, amittat illam custodiam, &c.* And this was confirmed by the *ft. W. 1. 21.*

And therefore, if a guardian in chivalry had committed wast, where he did not claim by the king's grant or commission, yet he should lose his custody. *Vide stat. W. 1. 21. Co. L. 53.*

If the king had the wardship, and committed or granted it to another, the king might take amends for the heir. *2 Inst. 13.*

If the king had not taken amends, an action for wast lay by the heir. *2 Inst. 13.*

If the heir, in ward, had brought an action within age, the guardian lost his custody. *Co. L. 54. a.*

If at full age, he recovered damages only. *Ibid.*

And by the *ft. Glo. 5.* he should recover treble damages; for by that statute treble damages are annexed to the action for wast. *2 Inst. 13. 306.*

So, the guardian shall now lose the custody, and treble value of the wast, and shall be fined to the king. *2 Inst. 300.*

But the guardian shall lose the custody of the land only, not of the body. *2 Inst. 14.*

And by the *ft. Glo. 5.* the heir shall recover damages only where the wardship is not sufficient for the value of the wast. *2 Inst. 306.*

(F 2.) Done by Tenant by Curtesy, Dower, for Life, or for Years.

By the *ft. Marl. 52 H. 3. 23. firmarii, &c. vastum, venditionem, vel exilium non facient, &c. Quod si fecerint et super hoc convincantur dampna plena restituant, et per misericordiam graviter puniantur.*

By the *ft. Glo. 6 Ed. 1. 5.* lose the thing wasted, and make amends of treble the value at which the wast shall be taxed.

And, therefore where, by the common law, tenant by curtesy and in dower answered only for the value of the wast, and had a custody assigned to him to prevent wast being afterwards done. *2 Inst. 300.*

Since the *ft. of Glo.* as well tenant by curtesy and in dower, as lessee for life or years, shall lose *locum vastatum*, and treble damages.

If wast be done *sparfim* in several parts of a house, the whole house shall be forfeited. *2 Inst. 303. Co. L. 54. a.*

So, if it be *sparfim* in the whole wood; for otherwise *locus vastatus*, and the residue of the wood, would be enjoyed by the lessor and lessee, which would occasion mutual trespasses by one upon the other. *2 Inst. 304.*

So, if a meadow be converted to tillage *sparfim*, thro' the whole. *2 Inst. 304.*

So,

So, if waſt be aſſigned in the hall of a houſe, the whole houſe ſhall be forfeited; for it is the principal part of the houſe, and it cannot be well divided from the houſe. *Cont. Co. L. 54. a. Acc. per Noy, Dy. 272. b. in marg.*

So, if waſt be in the kitchen, &c. of a caſtle; for the caſtle cannot be divided. *Dy. 272. b. in marg.*

So, the leſſor may waive waſt againſt the leſſee, and maintain *trover* againſt him who took trees cut down during the term. *R. per thrae J. Cro. cont. Cro. Car. 242.*

But if the place, in which the waſt was committed, may be conveniently divided from the reſidue, that only ſhall be recovered; as, if the part of a wood, where the waſt was, may be ſeparated from the other. *2 Inſt. 304. Co. L. 54. a.*

So, if waſt be aſſigned in throwing down, &c. the pales of a park, &c. if it does not appear that there were deer there, or that they were diſperſed, the plaintiff ſhall recover only ſo much of the place as where the pales were ſtanding. *R. 2 Rol. 836. l. 10.*

So, if waſt is aſſigned in three acres, and found only in one, the plaintiff ſhall recover but one, tho' the defendant pleads a plea which amounts to a forfeiture of the whole; as, if he claims the fee. *2 Inſt. 305.*

If waſt be brought in the *tenet*, the plaintiff, generally, ſhall recover *locum vaſtatum*, and treble damages. *2 Inſt. 304.*

If parceners leaſe to *A.* who commits waſt, one parcener has iſſue and dies, *A.* commits freſh waſt, in an action for both waſts, by the aunt and niece, they ſhall have judgment for the place waſted, and treble damages for the laſt waſt, and the aunt ſhall have a ſeparate judgment for treble damages for the firſt waſt. *2 Inſt. 305.*

But if waſt be brought in the *tenuit*, (as where the eſtate of the leſſee is determined by effluſion of time, or the act of God, or tort of the tenant, as by forfeiture, &c.) the plaintiff ſhall recover damages only. *2 Inſt. 304.*

So, if the leſſee's eſtate determines *pendente lite*; for the action does not abate. *2 Inſt. 304.*

If a leaſe be to *A.* for life, remainder to a woman for years, and they intermarry, if the reverſioner brings waſt againſt them, he ſhall recover both eſtates. *2 Leo. 7.*

As to Proceſs, Count, Pleas, View and Judgment in *Waſt*, vide in *Pleader*, (3 O 1, &c.)

Vide more concerning *Waſt*, in *Chancery* (D 11.—4 X).—*Chafe*, (N 1, &c.)—*Copyhold*, (M 3.)—*Pleader*, (3 O 1, &c.)—*Prohibition*, (F 16.)

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W R E C K.

(A) Wreck, Flotfan, Jetfan; what shall be.

WRECK is, where goods after shipwreck are thrown upon the land, and no man, dog, or other animal escapes alive out of the ship. 2 Inst. 166. *Flotfan*

Flotsan is, where goods, after shipwreck, lie floating or swimming upon the top of the water. *Bl. Nom. verb. Jetsan.*

Jetsan is, any thing cast out of the ship, being in danger of a wreck, and beaten to the shore by the waves, or cast on it by the mariners. *Bl. Nom. verb. Flotsan.*

But if any animal escapes alive to land, it will not be a *wreck*; for a dog and cat are only specified as examples. *2 Inst. 167.*

So, the king's goods shall not be a *wreck*, if the property be proved at any time. *2 Inst. 168.*

So, if a ship being in distress, all desert her, and any one come alive to land, tho' the ship afterwards perishes, there will be no *wreck*. *2 Inst. 167.*

So, if a ship be pursued by enemies, and all the mariners, to save their lives, desert the ship and come to land, and the ship is ransacked by the enemies, and afterwards put to sea, and there perishes, it will be no *wreck*. *Ibid.*

So, if a ship, being in a tempest, cuts its cable, the anchor is not *wreck*. *2 Rol. 159.*

By the *st. W. 1. 3 Ed. 1. 4.* (which is only a declaration of the common law) the things must be kept by view of the sheriff, coroner, king's bailiff, &c. and bailed in the hands of those of the town where found; and if any one proves property within a year and a day, they shall be restored to him without delay; if not, they remain to the king. *Vau. 164.*

And *wreck* belongs to a subject by grant or prescription. *2 Inst. 168.*

In which case the sheriff, &c. must deliver the goods to the grantee. *Ibid.*

If the sheriff, &c. does not do it, he shall be imprisoned and fined at the king's will, and render damages. *2 Inst. 166. 168.*

If the goods are not kept by the sheriff, but taken away by the neighbours, the owner shall have a commission of *oyer and terminer* to inquire of the trespass, and to make restitution. *2 Inst. 168.*

But if the goods found are *bona peritura*, the sheriff may sell them within the year. *2 Inst. 168.*

The year and day, within which the owner may prove his property, shall be computed from the seizure, as *wreck*. *2 Inst. 168.*

And if the owner dies within that time, his executor or administrator may prove his property. *2 Inst. 168.*

Goods, which are *wreck*, pay no customs. *R. Vau. 161, &c.*

[By *st. 26 G. 2. c. 19.* stealing from wreck, wounding any person wrecked, or obstructing his escape, or putting out false light, is felony without clergy.]

[But for goods of small value cast on shore, and stolen without circumstances of cruelty, offender may be indicted and punished for petty larceny.]

[Justice may issue search-warrant for wrecked goods; or goods offered to sale, supposed wrecked, may be stopped, and justice may commit offender for six months, or till payment of treble value.]

[Persons saving goods, and giving notice, or discovering concealed goods, entitled to salvage.]

[When a vessel is stranded, the nearest justice, &c. shall give notice for a meeting of sheriff, justices, &c. to give assistance, and adjust salvage.]

[If the salvage is not paid, officers of customs may sell goods to pay it.]

[On oath of plunder, theft, or breaking ship, made and delivered to clerk of peace, he shall prosecute, on pain of 100*l.*, the charges to be paid by treasurer of county.]

[Persons assaulting officers employed in salvage, shall be transported for seven years.]

[Persons employed shall act under the orders of master, owners, officer of customs, of excise, sheriff, justice, mayor, commissioner of land-tax, chief constable, petty constable, on pain of 5*l.* or three months' commitment.]

[The ship's name, &c. shall be sent, on oath, to the secretary of the Admiralty, and published in *Gazette*.]

Vide more concerning *Wreck*, in *Admiralty*, (F 7.)—*Officer*, (G 10.)

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Vide *Brief*.

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